185

Supreme Court, U.S.
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In The

Supreme Court of the United States

MELISSA J. STINE,

Petitioner,

v.

RICK A. YARNALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2008, debtor Melissa J. Stine filed a petition for bankruptcy protection under chapter 13 of Title 11 of the United States Code. Her chapter 13 Trustee objected to her proposed bankruptcy plan based on her taking a deduction for mortgage payments on a junior lien which was "stripped" by order of the bankruptcy court.

After extensive briefing and oral argument by both parties, Stine prevailed over the Trustee's objection, and her chapter 13 plan was confirmed. The Trustee then appealed the bankruptcy court's judgment to the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals. Stine did not participate in that appeal. After briefing and oral argument by the Trustee, the Bankruptcy Appellate Panel reversed the judgment of the trial court by a 2-1 vote in a published opinion.

Stine appealed the Bankruptcy Appellate Panel's decision to the Ninth Circuit Court of Appeals, but the Ninth Circuit dismissed her appeal summarily. The Ninth circuit held that the debtor lacked standing to appeal because she didn't make an appearance or object in the proceedings before the Bankruptcy Appellate Panel.

The question presented is:

Does a party forfeit standing to appeal to the circuit court after fully participating and prevailing in the bankruptcy court, but not appearing or objecting as appellee when the bankruptcy appellate panel reverses on the merits?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all the parties.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
I. A Party's Standing to Appeal a Court Order in Bankruptcy Proceedings Depends on Meeting the "Person Aggrieved" Test	7
II. Review is Warranted to Resolve the Conflict Between Circuits on the Prerequisites for Standing to Appeal a Bankruptcy Court Order	10
A. The Ninth Circuit Incorrectly Dismissed Debtor's Appeal from the Order of the BAP Based on Precedent in Which a Party Lacked Standing to Appeal Because of Failure to Appear or Object at the Bankruptcy Court Level	17

TABLE OF CONTENTS – Continued

Page

B. The Ninth Circuit's Summary Dismissal of Stine's Appeal Disregards the BAP's Authority to Set Standards for the Cases Before It 20

CONCLUSION 23

APPENDIX

Order of the United States Court of Appeals for the Ninth Circuit, entered January 3, 2011 ... App. 1

Opinion from the United States Bankruptcy Appellate Panel for the Ninth Circuit, entered October 5, 2009 ..... App. 4

Judgment of the United States Bankruptcy Appellate Panel for the Ninth Circuit, entered October 5, 2009 ..... App. 31

Conditional Order of Waiver of the United States Bankruptcy Appellate Panel for the Ninth Circuit, entered March 12, 2009 ..... App. 33

Order Allowing Joint Briefing of the United States Bankruptcy Appellate Panel for the Ninth Circuit, entered February 25, 2009 .... App. 35

Briefing Order of the United States Bankruptcy Appellate Panel for the Ninth Circuit, entered December 26, 2008 ..... App. 37

Opening Letter of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, entered December 26, 2008 ..... App. 42

TABLE OF CONTENTS – Continued

Page

Form Letter and Checklist re Readiness from U.S. Bankruptcy Appellate Panel of the Ninth Circuit, entered December 26, 2008 ... App. 46

Order Overruling Trustee's Objections to Confirmation of the United States Bankruptcy Court for the District of Nevada, entered December 22, 2008 ..... App. 48

Order Confirming the Debtor(s) Plan #2 and Awarding Fees to the Debtor(s) Attorney of the United States Bankruptcy Court for the District of Nevada, entered December 5, 2008 ..... App. 51

TABLE OF AUTHORITIES

Page

CASES

Bayard v. Lombard, 50 U.S. 530, 9 How. 530 (1850) 8

Boyle v. Zacharie, 31 U.S. 648, 6 Pet. 348 (1832) 8

Ex parte Tobacco Board of Trade, 222 U.S. 578 (1911) 8

Freytag v. Commissioner, 501 U.S. 868 (1991) 10, 11, 14, 17, 19

Hamilton v. Lanning, 545 F.3d 1269 (10th Cir. 2008) 4

Hamilton v. Lanning, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010) 4

In re American Ready Mix, Inc., 14 F.3d 1497 (10th Cir. 1994) 9

In re Carbide Cutoff, 703 F.2d 259 (7th Cir. 1983) 9

In re Commercial W. Fin. Corp., 761 F.2d 1329 (9th Cir. 1985) 9, 17, 19

In re Ernst, Inc., 2 B.R. 757 (Bankr. S.D. N.Y. 1980) 12

In re Ray and Berwick Black Cattle Co., 597 F.3d 871 (7th Cir. 2010) 18

In re Schwinn Bicycle Co., 209 B.R. 887 (D. N.D. Ill. 1997) 18

TABLE OF AUTHORITIES – Continued

Page

In the Matter of Fondiller, 707 F.2d 441 (9th Cir. 1983) 9

In the Matter of Schultz Mfg. Fabricating Co., 956 F.2d 686 (7th Cir. 1991) 18

Int'l Trade Admin. v. Rensselaer Polytechnic Inst., 936 F.2d 744 (2d Cir. 1991) 9, 11, 12

Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988) 9

Maney v. Kagenveama (In re Kagenveama), 541 F.3d 868 (9th Cir. 2008) 4, 5

Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187 (9th Cir. 2003) 21, 22

Ransom v. FIA Card Services, N.A., 131 S. Ct. 716, 178 L. Ed. 2d 603 (2010) 4

Ransom v. MBNA Am. Bank, 577 F.3d 1026 (9th Cir. 2008) 4

Seniority Research Group v. Chrysler Motor Corp., 976 F.2d 1185 (8th Cir. 1992) 16

Singleton v. Wulff, 428 U.S. 106 (1976) 16

Walton v. Sosne (In re Walton), 391 B.R. 827 (B.A.P. 8th Cir. 2008) 15, 16

Weston v. Mann (In re Weston), 18 F.3d 860 (10th Cir. 1994) 18

TABLE OF AUTHORITIES – Continued

Page

White v. Univision of Virginia Inc. (In re Urban Broadcasting Corp.), 401 F.3d 236 (4th Cir. 2005) 12, 13, 14

Yarnall v. Martinez (In re Martinez), 418 B.R. 347 (B.A.P. 9th Cir. 2009) 1

STATUTES

11 U.S.C. § 67(c) 8

11 U.S.C. § 101 6

11 U.S.C. § 506(a) 2

11 U.S.C. § 707b)(2) 4

11 U.S.C. § 707(b)(2)(A)(iii) 3

11 U.S.C. § 1325(b) 3

11 U.S.C. § 1325(b)(2) 5

11 U.S.C. § 1325(b)(3) 3, 4

28 U.S.C. § 157(b)(1) 1

28 U.S.C. § 157(b)(2)(L) 1

28 U.S.C. § 158(b) 1

28 U.S.C. § 158(d) 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1334 1

Federal Rule of Bankruptcy Procedure 2018 11

Federal Rule of Civil Procedure 46 10

TABLE OF AUTHORITIES – Continued

Page

Federal Rule of Criminal Procedure 51 10

Federal Rule of Criminal Procedure 52(b) 10

OTHER AUTHORITIES

Coke, Edward, *The First Part of the Institutes of the Laws of England, Or, a Commentary upon Littleton*. London, 1823 7

Collier on Bankruptcy (A. Resnick and H. Sommer, eds., 15th ed. Rev. 1981) 9

Official Form B22C 2, 3

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION AND JUDGMENT BELOW

The Bankruptcy Court's order confirming the debtor's plan and awarding fees to the debtor's attorney is reprinted in the Appendix ("App.") at App. 51. The Bankruptcy Court's order overruling the trustee's objections to confirmation is reprinted at App. 48. The opinion of the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals is reprinted at App. 4, and officially reported at 418 B.R. 347 (B.A.P. 9th Circuit 2009). The order of the Ninth Circuit dismissing debtor's appeal is reprinted at App. 1.

STATEMENT OF JURISDICTION

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(1) and (b)(2)(L). The Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 158(b). The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 158(d). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

There is no statutory provision setting forth the requirements for appellate standing in bankruptcy proceedings under the 1978 Bankruptcy Code.

STATEMENT OF THE CASE

The facts in this matter are undisputed. In May 2008, the debtor, Melissa J. Stine, Francisco J. Martinez, and Alex Wathen (collectively "Debtors") filed separate petitions for bankruptcy relief under chapter 13 of Title 11 of the United States Code. Debtors filed their respective Statements of Current Monthly Income and Calculation of Commitment Period and Disposable Income ("Form B22C"). They each filed a motion to value collateral, to strip off liens, and to modify rights of the holders of junior liens on their residences, alleging in each instance that no equity existed in the property beyond the secured claim of the holder of the first priority lien.

In each case, the bankruptcy court entered an order stripping the lien of the junior lienholder, finding that "on the filing date of the instant chapter 13 petition," the claim was "wholly unsecured." The courts therefore ordered that the junior lienholders' "secured claims" be "stripped off" and treated as a "general unsecured claim" pursuant to 11 U.S.C. § 506(a), and that the junior lienholders' "secured rights and/or lien-holder rights in the Subject Property are hereby terminated."

Because the Debtors were above-median income debtors, they calculated their "disposable income" for the purposes of plan payments by utilizing the means test formula set forth in 11 U.S.C. § 707(b)(2)(A)(iii), which allows debtors to deduct from their gross monthly income payments "contractually due to secured creditors." *See* 11 U.S.C. §§ 1325(b)(3) and 707(b)(2)(A)(iii). In each case, on Form B22C, the Debtors deducted from their gross income the amounts due under the relevant contracts with the junior lienholders, even though the Debtors were not making these payments postpetition and even though they obtained orders stripping off the relevant liens based upon petition date values. Stine's Amended Form B22C reflected a disposable income of $22.50 a month if the payments for the stripped mortgage were deducted. By contrast, removing the stripped mortgage payments from the means calculation would leave Stine's monthly disposable income at $377.50 a month.

Respondent Rick A. Yarnall, the Chapter 13 Trustee ("Trustee"), objected to confirmation in each of the cases on the theory that the Debtors had failed to devote all of their projected disposable income to payment of unsecured creditors as required by 11 U.S.C. § 1325(b) and that their plans were not proposed in good faith.

Following extensive briefing by the Trustee and the Debtors, the three assigned bankruptcy judges held a consolidated hearing on the Trustee's objections to confirmation of the Debtors' plans. Applying

Maney v. Kagenveama (In re Kagenveama), 541 F.3d 868 (9th Cir. 2008), the bankruptcy courts each held that an above-median income debtor's disposable income is determined as of the effective date, and that the fixed formula of the means test under 11 U.S.C. § 707(b)(2), as incorporated by 11 U.S.C. § 1325(b)(3), permitted the Debtors to deduct payments to the junior lienholders, even though the Debtors intended to, and in fact did, strip the liens of those lienholders and did not make any postpetition payments to those lienholders. On December 5, 2008, the court in Stine's case entered an order confirming her chapter 13 plan, and on December 22, 2008, the court entered an order overruling the Trustee's objection to confirmation. Similar orders were entered in the cases of the other Debtors, and the Trustee timely appealed to the Ninth Circuit Bankruptcy Appellate Panel ("BAP").

The BAP did not consolidate the appeals. Instead, the BAP authorized a joint brief from appellees but they did not appear or object in the appeals before the BAP.

By a 2 to 1 vote, the BAP reversed the judgments of the bankruptcy courts. The BAP relied in part on the holdings in *Hamilton v. Lanning*, 545 F.3d 1269 (10th Cir. 2008), later affirmed by this Court at 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010), and in *Ransom v. MBNA Am. Bank*, 577 F.3d 1026 (9th Cir. 2009), later affirmed by this Court in *Ransom v. FIA Card Services, N.A.*, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2010). The BAP reasoned that the Debtors valued their

residences such that payments to the stripped lienholders were completely unnecessary to the Debtors' maintenance and support. The BAP disagreed with the reliance by the bankruptcy courts on *In re Kagenveama*, *supra*, for a backward-looking analysis of expenses and income in calculating disposable income. The BAP viewed the language of 11 U.S.C. § 1325(b)(2) to require that expenses be reasonably necessary for the support and maintenance of the debtor. Where the debtor ceased to make payments on junior liens, the "phantom" payments could not be considered reasonably necessary for the debtor's support or maintenance, and these illusory payments were disallowed in the calculation of disposable income.

Debtors appealed the order of the BAP. Both Debtors and the Trustee briefed the Ninth Circuit on whether stripped payments to junior lienholders could be included in the calculation of disposable income. Trustee contended that the appeal was not properly before the court of appeals because a decision was rendered by the BAP with no appearances by the Debtors. Trustee also observed that the appeal was moot as to the Debtors Martinez and Wathen, since their cases had already been dismissed by the bankruptcy courts, and the Ninth Circuit dismissed their appeals as moot.

In ruling on Stine's appeal, the Ninth Circuit noted that although the debtor received ample notice of the proceedings before the BAP, she failed to appear and participate in the resolution of that appeal.

The court held that "an appellant lacks standing to challenge a decision rendered without her participation or objection." Accordingly, the Ninth Circuit dismissed Stine's appeal on the grounds that "attendance and objection" at the prior proceedings are "prerequisites" for standing to appeal.

REASONS FOR GRANTING THE PETITION

There is a sharp split between the Courts of Appeals on the requirements for appellate standing in bankruptcy proceedings under the 1978 Bankruptcy Code (the "Code"), 11 U.S.C. §§ 101 et seq. The Seventh, Ninth and Tenth Circuits have ruled that, in order to have standing to appeal an order of a bankruptcy court, the party must be a "person aggrieved," as discussed below; also, the party needs to satisfy the "prerequisites" of appearing and objecting to the motion or other matter being litigated in the court below. By contrast, the Second and Fourth Circuits, and the Eighth Circuit Bankruptcy Appellate Panel ("BAP"), have found that, for purposes of standing to appeal a bankruptcy court order or judgment, it suffices for the party to be a "person aggrieved." The Second and Fourth Courts of Appeals, and the Eighth Circuit BAP, have held specifically that a party retains standing to appeal an adverse order regardless of whether the appellant participates in the lower court by appearing and objecting.

The Seventh, Ninth and Tenth Circuits have incorporated procedural compliance into assessing a party's standing to appeal. A party might suffer direct financial detriment from a bankruptcy court judgment, but the appellant will nonetheless not be considered a "person aggrieved" with standing to appeal unless the appellant participates fully in any contested motion or adversary proceeding.

In dismissing Stine's appeal, the Ninth Circuit found that "an appellant lacks standing to challenge a decision rendered without her participation or objection," since "attendance and objection" at the prior proceedings are "prerequisites" for standing to appeal. App. 3. The Ninth Circuit's holding conflated debtor's status as a "person aggrieved" who has standing to appeal, with the debtor's participation in contested matters.

I. A PARTY'S STANDING TO APPEAL A COURT ORDER IN BANKRUPTCY PROCEEDINGS DEPENDS ON MEETING THE "PERSON AGGRIEVED" TEST.

It is an established principle that standing to bring a writ of error, or appeal, to reverse a judgment depends on being "grieved." Justice Story, delivering the opinion of the Court in refusing to quash an interlocutory order, wrote:

> It is admitted that the language of Co.Litt. 288b [Coke's Commentary Upon Littleton (1628)] is entirely correct in stating that

> "a writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment or execution" in a suit.

Boyle v. Zacharie, 31 U.S. 648, 655-56, 6 Pet. 348 (1832), cited in *Bayard v. Lombard*, 50 U.S. 530, 551, 9 How. 530 (1850). In 1911, Benjamin N. Cardozo appeared for petitioner trade board of the City of New York to seek a writ of mandamus so that petitioner could intervene in an anti-trust case against American Tobacco Company. The Court, in a per curiam opinion, denied leave to file the writ, and held that "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *Ex parte Tobacco Board of Trade*, 222 U.S. 578, 581 (1911). The "grieved" party must be privy to the record in order to have standing to appeal.

There is unanimity among the Circuits that the "person aggrieved" test for appellate standing in bankruptcy derives from the Bankruptcy Act of 1898, as amended in 1938 (the "Act"), which contained an explicit provision, section 39(c), permitting appeal by any "person aggrieved by an order of a referee." 11 U.S.C. § 67(c) (repealed 1978). The Bankruptcy Code of 1978 (the "Code") contains no parallel provision, but the bankruptcy courts have adopted the "person aggrieved" test to determine standing for bankruptcy appeals:

> Under section 39(c) of the former Bankruptcy Act, only a "person aggrieved" by a bankruptcy referee's order was permitted to file a petition for review of that order.

> 11 U.S.C. § 67(c). 1 Collier on Bankruptcy ¶ 3.03[6][a][i] (15th Ed. 1981). The new Bankruptcy Code, however, omitted this section and does not specify the prerequisites for standing to appeal from bankruptcy court orders. Nevertheless, it has been suggested that courts should adopt the standards formerly developed under the Act. 1 Collier on Bankruptcy ¶ 3.03[6][b] (15th Ed. 1981). The purpose of the "aggrieved" party requirement was to limit appeals to those parties who were directly and adversely affected by a bankruptcy court order (citations omitted).

In re Carbide Cutoff, 703 F.2d 259, 264 (7th Cir 1983). *See also, Kane v. Johns-Manville Corp.*, 84: F.2d 636, 641-42 (2d Cir. 1988); *Int'l Trade Admin. v Rensselaer Polytechnic Inst.*, 936 F.2d 744, 747 (2c Cir. 1991); and *In re American Ready Mix, Inc.*, 1- F.3d 1497, 1500 (10th Cir. 1994). As a consequence the "person aggrieved" is one who is "directly and ad versely affected pecuniarily by an order of the bank ruptcy court." *In the Matter of Fondiller*, 707 F.2c 441, 443 (9th Cir. 1983), cited in *In re Commercial W Fin. Corp.*, 761 F.2d 1329, 1334 (9th Cir. 1985). Onl a person who is directly and adversely affected ha: standing to appeal a bankruptcy court order.

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN CIRCUITS ON THE PREREQUISITES FOR STANDING TO APPEAL A BANKRUPTCY COURT ORDER.

The concurrence in *Freytag v. Commissioner*, 501 U.S. 868 (1991) distinguishes between when an appeal may be heard on the merits, and when the appellant has waived any right to challenge the trial court's order. The concurrence argues that petitioners' constitutional challenge on the merits should not have been entertained, because the petitioners failed to object at trial to the assignment of their cases to a special trial judge, and expressly consented to that assignment. *Freytag*, 501 U.S. at 892 (Scalia, J., concurring in part and concurring in the judgment) (with whom JJ. O'Connor, Kennedy and Souter join). Failure to make timely assertion of a right may forfeit the claim: "A party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial." *Id.*, at 893-94 (Scalia, J., concurring). The petitioner's arguments must be raised at time of trial:

> In the federal judicial system, the rules generally governing the forfeiture of claims are set forth in Federal Rules of Criminal Procedure 51 and 52(b) and Federal Rule of Civil Procedure 46. . . . These rules reflect the principle that a trial on the merits, whether in a civil or criminal case, is the "main event," and not merely "a tryout on the road" to appellate review (citation omitted). **The very word "review" presupposes that a**

> **litigant's arguments have been raised and considered in the tribunal of first instance.** To abandon that principle is to encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claiming that the course followed was reversible error (emphasis added).

Freytag, 501 U.S. at 895 (Scalia, J., concurring). No one contends in the Stine case that petitioner's arguments for confirmation of her chapter 13 plan were not raised in the bankruptcy court. A contested hearing on the Trustee's objection to plan confirmation was extensively briefed and orally argued by both parties.

In *Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d at 747, the Second Circuit Court of Appeals found that the bank which held a secured interest in a disputed lease qualified as a "person aggrieved" because it would be "directly and adversely affected pecuniarily" by an affirmance of a challenged bankruptcy court order (citation omitted). Therefore the bank had standing to bring an appeal. The Second Circuit rejected the argument that the bank lacked standing because it failed to intervene in the bankruptcy court pursuant to Federal Rule of Bankruptcy Procedure 2018. That rule, which governs permissive intervention, expands the right to be heard to a wider class than those who qualify under the "person aggrieved" standard, but does not limit

the rights of a "person aggrieved" to be heard. The Second Circuit held that "persons aggrieved" have a "general right to appeal and need not formally intervene to preserve that right." *Ibid.*, at 748.

In *White v. Univision of Virginia Inc. (In re Urban Broadcasting Corp.)*, 401 F.3d 236 (4th Cir. 2005), the Fourth Circuit Court of Appeals confronted the issue of whether failure to appear and object at bankruptcy court hearings precludes standing to appeal, as the district court had found. Instead, the Fourth Circuit followed the holding in *In re Ernst, Inc.*, 2 B.R. 757, 761 (Bankr. S.D. N.Y. 1980), which recognized that the now-repealed Bankruptcy Act provision that originated the "person aggrieved" standard did not include any appearance requirement. The circuit court rejected the district court's reasoning that the majority shareholder lacked standing to appeal after failing to appear and object at a court hearing on a claim:

> The test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a *person aggrieved* by the bankruptcy order (citation omitted). Likewise, it is well established that a person aggrieved is "a party 'directly and adversely affected pecuniarily (citation omitted).'"

In re Urban Broadcasting Corp., 401 F.3d at 243-44. The *Urban Broadcasting* court calls attention to the fact that basic notions of standing should not be confused with notions of waiver and forfeiture:

> We conclude that defining standing by whether a party waives or forfeits rights to object to claims, as did the district court, misconstrues the standing requirement as we have defined it, i.e., that the appellant show that he has been *directly and adversely affected pecuniarily* by the bankruptcy order. **Moreover, defining standing by whether an appellant has objected to an order or attended a hearing conflates basic notions of standing with notions of waiver and forfeiture.** Accordingly, we . . . ask only whether [the majority shareholder] was directly and adversely affected pecuniarily by the bankruptcy court's order (emphasis added).

Ibid., at 244. The Fourth Circuit found that the majority shareholder did not abandon his standing to appeal by failing to appear and object at a bankruptcy court hearing on a claim. Yet the Court of Appeals affirmed the district court's dismissal of the shareholder's appeal because it made no economic difference whether or not the claim was allowed. The shareholder was not a "person aggrieved" because he failed to demonstrate that the bankruptcy court's order allowing a claim directly and adversely affected his pecuniary interests.

The Fourth Circuit also found in *Urban Broadcasting Corp.* that appellant had violated the comprehensive scheduling order of the bankruptcy court, which provided that the shareholder file any objection

to allowance of the claim by a certain date "or be forever barred":

> [T]he order, directing [the shareholder] to file any objection he might have . . . "or be forever barred," was clear and functioned much like any writ of summons that commences an action or proceeding . . . [T]he bankruptcy court's order stated . . . that failure to file his objection would forever preclude his making an objection. Because we have been given no reason why this order should not be enforced and can discern no reason ourselves, we conclude that it was properly enforced according to its terms.

In re Urban Broadcasting Corp., 401 F.3d at 246. Enforcement of the order according to its terms amounted to a "waiver or forfeiture of [the shareholder's] right to challenge the order on appeal." *Ibid.* The Fourth Circuit cites the concurrence in *Freytag*, which notes that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it (internal citation omitted)." *Freytag v. Commissioner*, 501 U.S. at 894 (Scalia, J., concurring). Because the bankruptcy court's order directed the shareholder to file an objection to the claim by a certain date or be forever barred, and because the order was concededly served on the shareholder, his failure to comply with the order amounted to a waiver or forfeiture of his right to challenge the order on appeal.

Walton v. Sosne (In re Walton), 391 B.R. 827 (B.A.P. 8th Cir. 2008) involved an appeal from the bankruptcy court's order, which sustained the chapter 7 Trustee's objection to the debtor's claimed exemption of an Individual Retirement Account. At the bankruptcy court, the debtor failed to respond to the Trustee's objection to his exemption. Then, after the bankruptcy court entered its order sustaining the Trustee's objection, the debtor filed an appeal. The Eighth Circuit BAP refused to follow the example of the Circuits that held an appellant was not a "person aggrieved" if he failed to participate and object on the contested claim:

> The Trustee seeks to dismiss this appeal on the grounds that the Debtor lacks standing to pursue the appeal. According to the Trustee, the Debtor is not a "person aggrieved" with standing to appeal the bankruptcy court's order because he did not respond to, or otherwise defend against, the Trustee's objection. Although there are cases in other jurisdictions applying the "person aggrieved" standard in this way, we opt for a more practical application of the concept that focuses impact of the judgment on the appealing party's interests rather than on the party's participation in the underlying proceedings. In this case, the bankruptcy court's order sustaining the Trustee's objection to the Debtor's claim of exemption in his IRA had a direct and adverse effect on the Debtor's pecuniary interests. Therefore, we find that the Debtor is a person aggrieved with

> standing to appeal the bankruptcy court's order sustaining the Trustee's objection, and the Trustee's motion to dismiss will be denied (footnotes omitted).

In re Walton, 391 B.R. at 828-29. The debtor was a "person aggrieved" because of the "direct and adverse effect on the Debtor's pecuniary interests" of the bankruptcy court's order, even though the debtor did not participate by responding to, or otherwise defending against, the Trustee's objection. The BAP dismissed the appeal on other grounds, namely that the debtor failed to respond to the Trustee's objection before the trial court and therefore was precluded from raising the issue on appeal. The BAP noted that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). As the Eighth Circuit Court of Appeals phrased the rule, "[n]ormally, a party may not raise an issue for the first time on appeal as a basis for reversal." *Seniority Research Group v. Chrysler Motor Corp.*, 976 F.2d 1185, 1187 (8th Cir. 1992) (internal citation omitted).

The decisions of the Second and Fourth Circuits, and the Eighth Circuit BAP, on standing to appeal in bankruptcy proceeds uphold the commonsense interpretation of a "person aggrieved" as a party receiving adverse pecuniary consequences from an adverse order or judgment. These circuits invoke the doctrine of forfeiture to uphold principles of judicial economy and compliance with court orders in cases where a

party does not participate at the trial court level or disregards a court order.

A. The Ninth Circuit Incorrectly Dismissed Debtor's Appeal from the Order of the BAP Based on Precedent in Which a Party Lacks Standing to Appeal Because of Failure to Appear or Object at the Bankruptcy Court Level.

The Ninth Circuit erred in basing its dismissal of Melissa Stine's appeal on the decision in *In re Commercial W. Fin. Corp.*, 761 F.2d 1329, 1335 (9th Cir. 1985), which held that "attendance and objection" at the prior proceedings are "prerequisites" for standing to appeal.

The context of Stine's appeal is markedly different from that of the appellant in *Commercial W. Fin. Corp.* Unlike the investors in that case, debtor Stine not only participated fully at the bankruptcy court level, but prevailed. Stine's active participation in the trial court proceedings was consistent with "the principle that a trial on the merits, whether in a civil or criminal case, is the 'main event,' and not simply 'a tryout on the road' to appellate review (internal citation omitted)." *Freytag*, 501 U.S. at 895 (Scalia, J., concurring). In *Commercial W. Fin. Corp.*, the appellants did not appear and object to the plan at the confirmation hearing.

The Seventh and Tenth Circuits' decisions in accord with *Commercial W. Fin. Corp.* involved

parties who lost out at the bankruptcy court level after failing to appear and participate in contested matters, and who then sought to appeal to the bankruptcy appellate panel or district court.

In the Matter of Schultz Mfg. Fabricating Co., 956 F.2d 686, 691 (7th Cir. 1991) was a decision by the Seventh Circuit which held that the debtors lacked standing to appeal on several grounds, including the fact that they did not appear and object at a bankruptcy court hearing authorizing the sale of equipment. *In re Schwinn Bicycle Co.,* 209 B.R. 887, 892-93 (D. N.D. Ill. 1997) dealt with a corporate defendant in a preference action which did not participate in any way at the trial court level on the preference claim, and presented no evidence to controvert that presented by the creditors' committee. Based on such willful nonparticipation, the district court held that the appellant's failure to appear and object precluded it from appealing the order entered by the bankruptcy court in the adversary proceeding. *In re Ray and Berwick Black Cattle Co.,* 597 F.3d 871, 874-75 (7th Cir. 2010) involved a holding by the Seventh Circuit that the debtors lacked standing to appeal the dismissal of their cases, since they did not appear or object at an omnibus hearing on numerous motions in their proceedings.

Likewise, *Weston v. Mann (In re Weston),* 18 F.3d 860, 864 (10th Cir. 1994) affirmed the judgment of a district court, which dismissed an appeal by the debtor and a group of creditors of the disputed election of a trustee in appellant debtor's chapter 7

bankruptcy proceedings. The debtor lacked standing to appeal because he was not a person with a financial interest in the bankruptcy court's order. The creditor appellants lacked standing as a "person aggrieved" because they did not object or respond to the motion to resolve the disputed election, and did not appear at the hearing set to resolve the debtor's objections.

The Seventh, Ninth and Tenth Circuits have held that "[p]rerequisites for being a 'person aggrieved' are attendance and objection at a bankruptcy court proceeding." *Commercial W. Fin. Corp.*, 761 F.2d at 1334-35. But indeed, Stine did attend and oppose the Trustee's objection in the bankruptcy court proceedings on confirmation of her chapter 13 plan, and Stine's amended plan was confirmed by the bankruptcy court over the Trustee's objection. True, Stine did not participate before the Ninth Circuit BAP, but *Commercial W. Fin. Corp.* and the comparable decisions involve failure to participate in the "main event," namely the trial or hearing in the bankruptcy court.

Stine readily concedes that "[a] party forfeits the right to advance on appeal a nonjurisdictional claim . . . that he fails to advance at trial." *See Freytag v. Commissioner*, 501 U.S. at 893-94 (Scalia, J., concurring). Stine raised her claims at trial. She did not forfeit her right to appeal.

The Ninth Circuit's reliance on *Commercial W. Fin. Corp.* to justify dismissal of Stine's appeal is

misplaced. Unlike the investors in that case, who failed to appear or object at the hearing on plan confirmation, Stine participated actively and successfully opposed the Trustee's objection to plan confirmation before the bankruptcy court. Stine's chapter 13 plan as confirmed by the bankruptcy court showed disposable income of $22.50 a month. However, after the BAP ruled that the stripped mortgage payments to the junior lienholder must be removed from the means test calculation, the monthly disposable income which Stine had to pay to the Trustee increased to $377.50 a month. Stine is a classic "person aggrieved" by the BAP holding because it directly caused her a pecuniary detriment. As dictated by the decisions of the Second and Fourth Circuit Courts of Appeals, and the Eighth Circuit BAP, Stine should retain her standing to appeal from the BAP's adverse judgment.

B. The Ninth Circuit's Summary Dismissal of Stine's Appeal Disregards the BAP's Authority to Set Standards for the Cases Before It.

The Ninth Circuit BAP's Briefing Order is instructive. The notice of potential risk sanction or disadvantage in briefing the appeal is directed at the appellant Trustee:

> **FAILURE OF APPELLANT TO TIMELY PROVIDE AN ADEQUATE OPENING BRIEF AND ADEQUATE EXCERPTS OF THE RECORD IN COMPLIANCE WITH**

> **THE GOVERNING RULES MAY RESULT IN DISMISSAL OF THE APPEAL, OR IN SUMMARY AFFIRMANCE OF THE RULING ON APPEAL.** *See Morrissey v. Stuteville (In re Morrissey)*, 349 F.3d 1187 (9th Cir. 2003) (emphasis in original).

App. 38. The *Morrissey* decision invoked the power of the BAP to impose sanctions for violations of procedural requirements. The Ninth Circuit held in *Morrissey* that it would review sanctions imposed by the BAP under an abuse of discretion standard of review

> Considerations of judicial policy . . . strongly favor reviewing BAP sanctions under an abuse of discretion standard of review. Doing so would maintain consistency in the standard of review applied to district court and BAP sanctions decisions on appeals from the bankruptcy courts. It would also strengthen the BAP's authority to police the bankruptcy bar . . . Accordingly, we hold that we review for abuse of discretion the BAP's imposition of sanctions for non-compliance with non-jurisdictional procedural requirements. Where, under that standard, summary affirmance is an appropriate sanction by the BAP, we do not reach the merits of the bankruptcy court's ruling.

Morrissey, 349 F.3d at 1190. Stine and the other Debtors did not submit briefs or appear before the BAP. Yet the BAP reviewed the bankruptcy court's legal conclusions on a de novo basis, heard oral

argument, and ruled on the merits when it reversed the trial court's holding. App. 10, 22-25.

The BAP issued a Conditional Order of Waiver drawing appellees' attention to the fact that appellees' brief had not been filed. The BAP specified the disadvantage to which appellees would be subjected if they did not timely file and serve their brief: "[i]f the Appellees [fail] to timely file and serve this brief, the Appellees will have waived [their] right to file a brief and to appear at oral argument." App. 33-34. The BAP's published opinion stated that "[w]e authorized a joint brief from appellees but they did not appear in these appeals (footnote omitted)." App. 9. Hence the "disadvantage" levied on the appellees, including Stine, was waiver of the right to file a brief and appear at oral argument. No other sanction was mentioned or imposed by the BAP.

In *Morrissey*, brought to the attention of the parties by the Ninth Circuit BAP, the Ninth Circuit Court of Appeals promised great deference to the BAP with respect to whatever sanctions – or absence of sanctions – the BAP imposed for procedural noncompliance. The BAP chose to review Stine's claims carefully in a closely-reasoned opinion despite her nonparticipation, and reached the merits in reversing the trial court's judgment by a 2-1 vote. The Ninth Circuit erred in summarily dismissing Stine's appeal. Stine had standing to appeal as a "person

aggrieved," and the circuit court should have heard her case on the merits.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment below.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: ALEX WATHEN, Debtor, ALEX WATHEN, Appellant, v. RICK A. YARNALL, Chapter 13 Trustee, Appellee., HAINES & KRIEGER, LLC, —.	No. 09-60043 BAP No. 08-01340-MoJuH ORDER*
In re: FRANCISCO J. MARTINEZ, Debtor, FRANCISCO J. MARTINEZ, Appellant, v. RICK A. YARNALL, Chapter 13 Trustee,	No. 09-60044 BAP No. 08-1332-MoJuH

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellee.,

_____,

HAINES & KRIEGER, LLC,

—.

In re: MELISSA J. STINE,
Debtor,

No. 09-60045
BAP No.
08-1335-MoJuH

MELISSA J. STINE,
Appellant,

v.

RICK A. YARNALL,
Appellee.,

_____,

HAINES & KRIEGER, LLC,

—.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel

Hollowell, Montali, and Jury,
Bankruptcy Judges, Presiding

Submitted December 8, 2010**

(Filed Jan. 3, 2011)

San Francisco, California

** The panel unanimously concludes this case is suitable for disposition without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: REINHARDT, HAWKINS, and N.R. SMITH, Circuit Judges.

The Ninth Circuit Bankruptcy Appellate Panel ("BAP") decided this case on October 5, 2009. On January 25, 2010, the bankruptcy courts dismissed the bankruptcies of Appellants Alex Wathen and Francisco Martinez for reasons unrelated to this appeal. This court lacks jurisdiction to decide appeals that become moot by the intervening dismissal of the underlying bankruptcy. *See In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001). Accordingly, the appeals for Wathen and Martinez are **DISMISSED**.

Additionally, although Appellant Melissa Stine received ample notice of the proceedings before the BAP, she failed to appear and participate in the resolution of that appeal. Under *In re Commercial W. Fin. Corp.*, 761 F.2d 1329, 1335 (9th Cir. 1985), an appellant lacks standing to challenge a decision rendered without her participation or objection, *see id.* ("attendance and objection" at the prior proceedings are "prerequisites" for standing to appeal). Accordingly, Ms. Stine's appeal is **DISMISSED**.

ORDERED PUBLISHED

UNITED STATES
BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: FRANCISCO J. MARTINEZ; MELISSA J. STINE; ALEX WATHEN, Debtors.	BAP Nos. NV-08-1332-MoJuH NV-08-1335-MoJuH NV-08-1340-MoJuH Bk. Nos. 08-14571-BAM 08-15414-LBR 08-15133-MKN
RICK A. YARNALL, Chapter 13 Trustee, Appellant, FRANCISCO J. MARTINEZ; MELISSA J. STINE; ALEX WATHEN; HAINES & KRIEGER, LLC, Appellees.	**OPINION**

Argued and Submitted by Videoconference
on May 19, 2009

Filed – October 5, 2009

Appeal from the United States Bankruptcy Court
for The District of Nevada

Hon. Linda B. Riegle, Bruce A. Markell, and Mike K. Nakagawa, Bankruptcy Judges, Presiding.

Before: MONTALI, JURY and HOLLOWELL, Bankruptcy Judges.

MONTALI, Bankruptcy Judge:

In cases pending before three different bankruptcy courts, above-median income chapter 13[1] debtors obtained orders valuing and "stripping off" wholly unsecured junior liens against their residences.[2] The debtors also proposed chapter 13 plans that deducted the expenses associated with those stripped liens from their "disposable income" devoted to plan payments. The chapter 13 trustee objected to confirmation of the three plans, and the three bankruptcy

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[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated after the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 ("BAPCPA").

[2] Terms such as "stripping off," "lien strip" or "motion to strip" are actually misnomers that have become part of everyday bankruptcy parlance. In fact, motions of this type are authorized under Rule 3012, "Valuation of Security" ("The court may determine the value of a claim secured by a lien on property on which the estate has an interest on motion. . . ."). See, for example, Guidelines for Valuing and Avoiding Liens in Individual Chapter 11 Cases and Chapter 13 Cases, United States Bankruptcy Court, Northern District of California, available at: http://www.canb.uscourts.gov/procedures/dist/guidelines/guidelines-valuing-and-avoiding-liens-individual-chapter-11-cases-and-cha.

For convenience, we will continue to use the more common terminology throughout this opinion.

judges held a consolidated hearing on the objections. The bankruptcy judges overruled the objections and entered orders confirming the plans. The chapter 13 trustee appealed each order. We REVERSE without reaching the trustee's good faith objections.[3] Our conclusion is reinforced by a persuasive and compelling statement from our own court of appeals just a few weeks ago: "Ironic it would be indeed to diminish payments to unsecured creditors in this context on the basis of a fictitious expense not incurred by a debtor." *Ransom v. MBNA Am. Bank* (*In re Ransom*), 577 F.3d 1026, 1030 (9th Cir. 2009).

I. FACTS

In May 2008, appellees Francisco J. Martinez ("Martinez"), Melissa J. Stine ("Stine"), and Alex Wathen ("Wathen") (collectively, "Debtors") filed separate chapter 13 petitions and filed their respective Statements of Current Monthly Income and Calculation of Commitment Period and Disposable Income ("Form B 22C"). They each filed a motion to value collateral, to strip off liens, and to modify rights

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[3] In a separate opinion we are issuing concurrently with this one we reach a similar conclusion regarding attempted deductions from disposable income for payments not being made because the underlying property has been voluntarily surrendered to the secured creditors, leaving any remaining claim no more than wholly unsecured. *American Express Bank, FSB v. Smith* (*In re Smith*), No. WW-08-1311, 2009 WL 3338406 (9th Cir. BAP Oct. 5, 2009).

of the holders of junior liens on their respective residences, alleging in each instance that no equity existed in the property beyond the secured claim of the holder of the first priority lien. Significantly, in each case, the Debtors alleged that "on the date the instant bankruptcy was filed," no equity existed in the subject properties, and that the affected junior lienholders were "wholly unsecured on the petition date."

In each case, the bankruptcy court entered an order stripping the lien of the junior lienholder, finding that "on the filing date of the instant chapter 13 petition," the claim was "wholly unsecured." The courts therefore ordered that the junior lienholders' "secured claims (sic) is 'stripped off' and shall be treated as a 'general unsecured claim' pursuant to [section] 506(a) . . . ", that each junior lienholders' claim "be reclassified as a general unsecured claim," and that the junior lienholders' "secured rights and/or lien-holder rights in the Subject Property are hereby terminated."

Because the Debtors were above-median income debtors, they calculated their "disposable income" for the purposes of plan payments by utilizing the means test formula set forth in section 707(b)(2)(A)(iii), which allows debtors to deduct from their gross monthly income payments "contractually due to secured creditors." *See* 11 U.S.C. §§ 1325(b)(3) and 707(b)(2)(A)(iii). In each case, on the Form B 22C, the Debtors deducted from their gross income the amounts due under the relevant contracts with the

respective junior lienholders, even though they were not making these payments postpetition and even though they obtained orders stripping off the relevant liens based upon petition date values.

Consequently, Martinez's Form B 22C reflected a *negative* disposable monthly income of $104.90, even though the disposable income would have been $352.10 a month if the phantom payments to the junior lienholder were excluded from the deductions. Similarly, Stine's Amended Form B 22C reflected a disposable income of $22.50 a month if the payments for the stripped mortgage were deducted. Removing the stripped mortgage payments from the means test calculation leaves Stine's monthly disposable income at $377.50 a month. Wathen's Form B 22C reflected a *negative* disposable income of $390.67, even though his monthly disposable income would have been $209.33 if the payments on the stripped junior lien were not included in the means test calculation.

Appellant Rick A. Yarnall, the chapter 13 trustee ("Trustee"), objected to confirmation in each of the cases, arguing that the Debtors had failed to devote all of their projected disposable income to payment of unsecured creditors as required by section 1325(b) and that their plans were not proposed in good faith. Following extensive briefing by Trustee and the Debtors, the three assigned bankruptcy judges held a

consolidated hearing on the Trustee's objections to confirmation of the Debtors' plans.[4]

Applying *Maney v. Kagenveama* (*In re Kagenveama*), 541 F.3d 868 (9th Cir. 2008), the bankruptcy courts each held that an above-median income debtor's disposable income is determined as of the effective date, and that the fixed formula of the means test under section 707(b)(2) (as incorporated by section 1325(b)(3)) permitted the Debtors to deduct payments to the junior lienholders, even though the Debtors intended to (and did) strip the liens of those lienholders and would not (and did not) make any postpetition payments to those lienholders.

On December 5, 2008, the courts in Martinez's and Stine's cases entered orders confirming the chapter 13 plans and orders overruling the Trustee's objections to confirmation. On December 8, 2008, the court in Wathen's case entered an order confirming the chapter 13 plan. Trustee timely appealed.

We did not consolidate the appeals. Instead we authorized a joint brief from appellees but they did not appear in these appeals.[5]

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[4] Trustee's objection to the chapter 13 plan of a fourth debtor was heard at the same time, but that case is not included in this appeal.

[5] Haines & Kreiger, LLC, is the lawfirm that represented Debtors in the bankruptcy courts. Although named in the caption, we do not consider it an appellee.

The case was argued before us on May 19, 2009. On August 14, 2009, the Ninth Circuit issued its *Ransom* decision.

II. ISSUE

In calculating their disposable income to be paid under their plans, may chapter 13 debtors deduct payments to junior lienholders to whom they will not be making payments under their plans because their liens have been stripped (*viz.*, valued at zero)?

III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 157(b)(2)(L) and § 1334. We have jurisdiction under 28 U.S.C. § 158.

IV. STANDARD OF REVIEW

The issue presented in these appeals is purely one of law and statutory construction; no factual dispute exists. "We review issues of statutory construction and conclusions of law, including interpretation of provisions of the Bankruptcy Code, de novo." *Mendez v. Salven* (*In re Mendez*), 367 B.R. 109, 113 (9th Cir. BAP 2007) (citing *Einstein/Noah Bagel Corp. v. Smith* (*In re BCE W., L.P.*), 319 F.3d 1166, 1170 (9th Cir. 2003)).

V. DISCUSSION[6]

A. Overview.

Section 1325(b)(1)(B) provides that if a trustee or unsecured creditor objects to confirmation of a chapter 13 plan, the court may not approve the plan unless, as of its effective date, the plan "provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B).

In *Kagenveama,* the Ninth Circuit held a debtor's "projected disposable income" for the purposes of section 1325(b)(1)(B) is the debtor's "disposable income" as defined in subsection (b)(2) "projected out over the 'applicable commitment period.'" *Kagenveama,* 541 F.3d at 872. The Ninth Circuit specifically rejected the chapter 13 trustee's argument that section 1325(b)(1)(B) requires a forward-looking determination of "projected disposable income."[7] *Id.* at 873-74.

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[6] Our analysis as set forth in *Smith* (see footnote 3), applicable to surrendered collateral, applies with equal force to the facts presented by these three appeals wherein the liens have been stripped. We incorporate that decision by reference and reiterate that analysis in this Part V for completeness of our record here.

[7] Since *Kagenveama's* issuance, four other courts of appeal have rejected its reasoning and holding. In particular, the Seventh Circuit held in *In re Turner,* 574 F.3d 349 (7th Cir. 2009), that a chapter 13 above-median income debtor could not deduct as an expense his mortgage payments on property that he intended to surrender. In reaching its holding, the Seventh Circuit refused to apply

(Continued on following page)

The Ninth Circuit also rejected the argument that the "disposable income" calculation of section 1325(b)(2)

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a mechanical calculation that considers expenses that exist on the petition date, noting that such a mechanical test is appropriate for determining eligibility to proceed under particular chapters.

> Since the object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover his living expenses against the interest of the unsecured creditors in recovering as much of what the debtor owes them as possible, we cannot see the merit in throwing out undisputed information, bearing on how much the debtor can afford to pay, that comes to light between the submission and approval of a plan of reorganization. Sometimes as in this case the creditors will benefit from the new information. But in other cases it will be the debtor. . . . The use of the later date, which is consistent with the statutory language though not compelled by it, is more sensible.

Id. at 355. *See also Nowlin v. Peake* (*In re Nowlin*), 576 F.3d 258 (5th Cir. 2009) (holding that "projected" disposable income permits consideration of "reasonably certain" future events and stating that the Ninth Circuit emphasized the modified definition of "disposable income" without recognizing the independent significance of the word "projected"); *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269 (10th Cir. 2008), *petn. for cert. filed*, 77 U.S.L.W. 3449 (Feb. 3, 2009) (Supreme Court has requested briefing by the Solicitor General on the petition (129 S.Ct. 2820)) (holding that starting point for calculating chapter 13 debtor's projected disposable income is presumed to be debtor's current monthly income, subject to showing of substantial change in circumstances); *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652, 659 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1630 (2009) (holding that the means test is only a starting point for determining a chapter 13 debtor's disposable income). "[T]he final calculation can take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J." *Frederickson*, 545 F.3d at 659.

was a presumptive starting point which could be supplemented by evidence of future or actual "finances of the debtor." *Id.* at 874, overruling *Pak v. eCast Settlement Corp.* (*In re Pak*), 378 B.R. 257, 267 (9th Cir. BAP 2007).

Section 1325(b)(2) defines "disposable income" as the debtor's current monthly income less the amounts reasonably necessary to be expended for, *inter alia,* the support of the debtor and his or her dependents. 11 U.S.C. § 1325(b)(2).[8] Section 1325(b)(3), however, restricts the ability of a bankruptcy court to determine

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[8] Section 1325(b)(2) provides:

> (2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended –
>
> (A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
>
> (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

the "amounts reasonably necessary to be expended" when the debtor has an above-median income.[9]

For a debtor with above-median income, "amounts reasonably necessary to be expended under paragraph (2) . . . shall be" calculated in accordance with section 707(b)(2)(A) and (B). 11 U.S.C. § 1325(b)(3). Section 707(b)(2) is the chapter 7 "means test" provision, and subsection (b)(2)(A)(iii) provides that the debtor's average monthly payments on account of secured debts shall be calculated as the sum (then divided by 60) of

> (I) the total of all amounts scheduled as contractually due to secured creditors in each

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[9] Section 1325(b)(3) provides:

> (3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than –
>
> (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
>
> (B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
>
> (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $575 per month for each individual in excess of 4.

> month of the 60 months following the date of the petition; and
>
> (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts[.]

11 U.S.C. § 707(b)(2)(A)(iii).

B. The Expenses Are Not Necessary for Debtors' Support.

Holding that *Kagenveama* requires application of a backward-looking or static measurement of an above-median income debtor's expenses in determining projected disposable income, the bankruptcy courts held that Debtors could deduct from their current monthly income mortgage payments which they will not be making. Thus, they held that postpetition events affecting income or expenses (such as surrender of collateral or stripping liens, even based on petition-date values) should not be considered in deciding whether an above-median income debtor has contributed all projected disposable income to a plan under section 1325.

We disagree. Sections 1325(b)(2) and (b)(3), read together, provide that if an expense is not reasonably necessary, it is not included in the calculation of

disposable income. If the expense is reasonably necessary for a debtor's and/or dependants' maintenance and support, and the debtor is an above-median income debtor, section 1325(b)(3) requires the court to determine the *amount* in accordance with section 707(b)(2).

A determination of whether an expense is reasonably necessary requires a court to consider what the debtor has to say about the financial realities existing at the time of confirmation of a chapter 13 plan, particularly where the affected lienholder consents by its silence. Here, where Debtors have no intention of paying the mortgage payments either through or outside their plans, and in fact have obtained orders stripping the liens effective as of the relevant petition dates, those mortgage payments cannot be necessary for the support of Debtors or their dependents. They made the decision to strip the liens, not the bankruptcy courts. Phantom payments cannot be necessary. The fact that courts make the value determinations to support the orders stripping the liens some time after the petition dates is of no consequence. The Debtors alleged, respondent undersecured creditors conceded by their defaults, and the courts found that the petition date values were correct. Had a creditor contended otherwise, the outcome may have been different, but that is not what happened in any of these three cases.

C. The Dicta of Kagenveama.

It goes without saying that we must follow binding precedent in our circuit, as the bankruptcy court felt it must. We do not read *Kagenveama* as binding precedent with respect to the calculation of expenses under sections 1325(b)(2) and (b)(3). Consequently, we are bound only by the Supreme Court's directive to follow the plain meaning of the words of a statute unless they lead to an absurd result.[10]

The issue before the Ninth Circuit in *Kagenveama* did not involve either the determination of what are proper expenses (under section 1325(b)(2)) or the measurement of them (under section (b)(3)). Its only meaningful allusion to expenses to be deducted from income is a passing reference to those two subsections, without any analysis:

> The revised "disposable income" test *uses a formula to determine what expenses are reasonably necessary. See* 11 U.S.C. § 1325(b)(2)-(3). This approach represents a deliberate departure from the old "disposable income" calculation, which was bound up with the

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[10] *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (plain meaning of legislation should be conclusive, except in rare cases in which literal application of statute will produce result demonstrably at odds with intention of its drafters; in such cases, intention of drafters, rather than strict language, controls); *Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004) (when statute's language is plain, sole function of courts, at least where the disposition required by statute's text is not absurd, is to enforce statute according to its terms).

> facts and circumstances of the debtor's financial affairs. *In re Winokur,* 364 B.R. 204, 206 (Bankr. E.D. Va. 2007); *In re Farrar-Johnson,* 353 B.R. 224, 231 (Bankr. N.D. Ill. 2006) (stating that "[e]liminating flexibility was the point: the obligations of [C]hapter 13 debtors would be subject to clear, defined standards, no longer left to the whim of a judicial proceeding") (internal quotations omitted).

Kagenveama, 541 F.3d at 874 (emphasis added).[11]

If those brief statements even rise to the level of dicta, they are still not binding on us because there is absolutely no analysis of whether sections 1325(b)(2) and (b)(3) operate as one, albeit redundantly, or in

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[11] Elsewhere in the opinion, in two footnotes, the subsections are cited:

> Disposable income is defined as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended[.]" 11 U.S.C. § 1325(b)(2). . . . Section 1325(b)(3) requires that if a debtor's annualized current monthly income is greater than the median family income of similarly-sized households, then "amounts reasonably necessary to be expended" are determined in accordance with § 707(b)(2).

Kagenveama, 541 F.3d at 872 n.1.

> BAPCPA replaced the old definition of what was "reasonably necessary" with a formulaic approach for above-median debtors. 11 U.S.C. § 1325(b)(3). This formula significantly changed the way in which "disposable income" is calculated.

Id. at 873 n.2.

sequence, with (b)(3) operative only if (b)(2) triggers it. More specifically, there is no analysis or discussion *whether* or *how* the subsections operate to determine deductible expenses.[12] We therefore do not violate the doctrine of *stare decisis* by applying an interpretation of the statutory scheme that teaches that if an item is not necessary for a debtor's support or maintenance, a debtor cannot engage in the fiction of pretending to pay for it.

It is true that figuring out "projected disposable income" necessarily involves consideration of proper expenses to subtract from "current monthly income". But the court in *Kagenveama* was struggling with the competing views about how to define "projected" with respect to the "income" half of the equation and was not addressing whether the deducted expenses were necessary for the debtor's support.[13]

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[12] *V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High School Dist.*, 484 F.3d 1230, 1232 n.1 (9th Cir. 2007) ("we are not bound by a holding 'made casually and without analysis, . . . uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention . . . '"), quoting *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006) (quoting *Johnson*, holding that statements made without a deliberate consideration of the issues presented are not binding and may be re-visited).

[13] In holding that "projected disposable income" is the same as "disposable income," the Ninth Circuit relied on *Anderson v. Satterlee* (*In re Anderson*), 21 F.3d 355, 357 (9th Cir. 1994) (pre-BAPCPA case, determining the debtor's "disposable income" and

(Continued on following page)

Thus, while *Kagenveama* directs us to "look backward" to define the income to be projected throughout the applicable commitment period, it did not address the definition of expenses or the measurement of them. Simply put, the opinion does not direct how courts are to calculate the "disposable" portion of "projected disposable income" (income minus expenses x temporal period of three or five years = amount to be paid to unsecured creditors). For this reason the opinion does not bind us to a rule of how to determine the expenses that must be applied to the income side of the equation, nor does it compel us to impose a symmetry that neglects the reality of the case before us, *viz.*, that Debtors decided that they did not need their extra vehicle or their two houses.

We apply the words of the statute even though doing so leaves us with a backward looking definition of projected disposable income (because of *Kagenveama*) and a definition of expenses which (because of the plain wording of the statute) takes into account financial realities (the liens have been stripped as of the petition date) occurring post-petition and incorporated into a debtor's chapter 13 plan.[14]

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then projecting that sum into the future for the required duration of the plan). This is how the court defined the term "projected" within the phrase "projected disposable income."

[14] While this may be labeled a "forward-looking" approach to expenses, it is actually consideration of "a fixed debt that we

(Continued on following page)

Without citing *Kagenveama* anywhere in its opinion, the *Ransom* court quoted our Panel's thinking on this very point:

> However, in making that calculation [what debtors can afford to pay their creditors], what is important is the payments that debtors *actually make,* not how many cars they own, because the *payments that debtors make* are what actually affect their ability to make payments to their creditors.

Ransom, 571 F.3d at 1029-30 (emphasis added).

D. Two-Part Analysis of Subsections (b)(2) and (b)(3).

Under the statute, a debtor may deduct from income those expenses reasonably necessary "for the maintenance or support of the debtor or a dependent

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know will disappear before the Chapter 13 plan is approved." *Turner,* 574 F.3d at 356. As Judge Posner stated on behalf of the Seventh Circuit in *Turner*:

> [B]ankruptcy judges must not engage in speculation about the future income or expenses of the Chapter 13 debtor. That would unsettle and delay the Chapter 13 process as well as exaggerate how accurately a person's economic situation in five years can be predicted. But in this case there is no speculation; all that is at issue is a fixed debt that we know will disappear before the Chapter 13 plan is approved.

Id.

of the debtor." 11 U.S.C. § 1325(b)(2)(A)(i).[15] Thus, we read sections 1325(b)(2) and (b)(3) in sequence, as follows: if a debtor says an expense is not reasonably necessary for the debtor's and/or dependants' maintenance and support, the inquiry ends at section 1325(b)(2) as there is no amount to determine in section 707(b)(2) via section 1325(b)(3). Stated otherwise, there is no corresponding amount to subtract from the income component to get to what is "disposable" for the above-median income debtor.

If the expense is reasonably necessary for the debtor's and/or dependants' maintenance and support, then section 1325(b)(3) requires the court to determine the *amount* in accordance with section 707(b)(2).[16] Sections 1325(b)(2) and (b)(3) require a two-step inquiry.

Applied to the facts before us, the Debtors valued their residences such that payments to the stripped lienholders were completely *unnecessary* to their maintenance and support. Thus they had no payments to make. As in *Ransom* in a situation having precisely the same economic effect (no lien at all

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[15] Subsection 1325(b)(2)(B) adds a deduction from current monthly income for necessary expenses for a debtor engaged in business.

[16] This is because section 1325(b)(2) begins "For purposes of this subsection, the term 'disposable income' means. . . ." Then subsection (b)(3) begins "Amounts reasonably necessary to be expended under paragraph (2) shall be determined. . . ."

there; no secured debt to pay here), the court's words are instructive:

> As did our BAP, we decide this issue not on the IRS's manual, but instead on the statutory language, plainly read, which we believe does not allow a debtor to deduct an "ownership cost" (as distinct from an "operating cost") that the debtor does not have. An "ownership cost" is not an "expense" – either actual or applicable – if it does not exist, period.

577 F.3d at 1030 (citation and internal quotation marks omitted).

The bankruptcy courts believed that *Kagenveama* requires a bankruptcy court to apply a "snapshot" petition-date analysis in calculating both prongs of disposable income: expenses and income. In other words, they felt they could not consider post-petition events in determining whether expenses are reasonably necessary for the maintenance and support of debtors and their dependants. We disagree because, as noted, the clear language of section 1325(b)(2) requires the expenses to be reasonably necessary for the support and maintenance of the debtor. In *Smith* we are holding that items that a debtor has surrendered or intends to surrender are not necessary for his or her support or maintenance. The concepts – surrender and necessity – are mutually exclusive of one another.

So too, here, the notions that a wholly unsecured debt – as of the petition date – must be paid as a secured debt cannot be reconciled. Phantom payments for valueless collateral are not reasonably necessary for a debtor's support and maintenance.

Section 1325(b)(2) therefore requires the court to look at the necessity of the expense as determined by the debtor on a real-time, forward-looking basis, while section 1325(b)(3)'s incorporation of section 707(b) requires a static, backward-looking inquiry, since 707(b) itself requires such an analysis. *See, e.g., Morse v. Rudler* (*In re Rudler*), 576 F.3d 37 (1st Cir. 2009). Here, section 1325(b)(3) does not come into play, so we are not bound by a backwards-looking inquiry.

This interpretation is consistent with the plain language of the statute. The Ninth Circuit in *Kagenveama* acknowledged that when a statute's language is plain, the court should enforce it according to its terms. *Kagenveama,* 541 F.3d at 872. To the extent that sections 1325(b)(2) and (b)(3) are ambiguous, this interpretation avoids an absurd result and is consistent with the intent of the statute's drafters.

Purely historical expenses which will never be paid under or outside of the plan (phantom expenses) cannot be reasonably necessary for a debtor's support or maintenance. To include them in the calculation of disposable income ignores the different functions of subsections (b)(2) and (b)(3).

In the cases before us, Debtors have chosen to value certain liens at zero and will not be making any payments under or outside their plans on the mortgages. Yet they are deducting these mortgage payments as expenses "necessary" for their support. Debtors cannot have it both ways. Either the expense is necessary or it no longer exists as a secured obligation for the purposes of their plans. Once Debtors opt to eliminate the secured claims, payment of those claims is no longer an expense that is necessary for their support under section 1325(d)(2). Consequently, there is no need to resort to section 1325(b)(3) and its dispatch to the mechanical formulas of section 707(b)(2)(A) & (B).[17]

VI. CONCLUSION

For the foregoing reasons, we REVERSE.

HOLLOWELL, J., dissenting,

Under the guise of a plain meaning statutory analysis, the majority holds that § 1325(b)(2) and (b)(3) must be read sequentially, thereby arriving at a "common sense" result which only permits an above median-income debtor to use the means test to

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[17] Based on our analysis, we do not need to deal with the merits of an alternate analysis to reach the same result as set forth by the district court in *Thissen v. Johnson*, 406 B.R. 888 (E.D. Cal. 2009).

calculate expenses *after* the debtor demonstrates the expense is reasonably necessary. While I sympathize with the majority's desire to achieve a common sense result, I cannot agree with its contorted statutory analysis.

Section 1325(b)(3) provides that when a debtor has an above-median income, the reasonably necessary expenses to be deducted from current monthly income ("CMI") "*shall be*" calculated in accordance with § 707(b)(2)(A) and (B), otherwise known as the means test. 11 U.S.C. § 1325(b)(3) (emphasis added). The word "shall" is mandatory. Therefore, for the above median-income debtor, expenses must be calculated under § 707(b)(2). *In re Farrar-Johnson,* 353 B.R. 224 (Bankr. N.D. Ill. 2006).

Presumably, Congress believed the inclusion of the means test into the calculation of an above median-income debtor's CMI was the mechanism through which debtors would meet BAPCPA's goals of ensuring debtors repay creditors the maximum they can afford and reducing judicial discretion and non-uniformity. *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way,* 13 Am. Bankr. Inst. L. Rev. 665, 677-683 (2005); *Maney v. Kagenveama* (*In re Kagenveama*), 541 F.3d 868, 875 (9th Cir. 2008); *In re Alexander,* 344 B.R. 742, 747-48 (Bankr. E.D.N.C. 2006) (Congress acted intentionally when it inserted the means test into the calculation of chapter 13 payment plans).

The Ninth Circuit, in *Kagenveama,* declined to "override the definition and process for calculating disposable income under § 1325(b)(2)-(3) as being absurd" even if it produced a less favorable result for unsecured creditors. 541 F.3d 868, 875 (9th Cir. 2008). In contrast, the Ninth Circuit recently determined, in *Ransom v. MBNA Am. Bank* (*In re Ransom*), 577 F.3d 1026 (9th Cir. 2009) that in order to reach a result consistent with BAPCPA's goal of ensuring that debtors repay creditors as much as possible, § 707(b)(2)(A)(ii)(I) could only be interpreted to "apply" expense standards in cases where debtors in fact pay such expenses.

Of course, as the majority notes, the somewhat inconsistent holdings of *Kagenveama* and *Ransom* are not binding as to the resolution of this case since they did not address the issue presented here on appeal. However, I part with the majority's contention that the *Kagenveama* court's statutory analysis and discussion about how projected disposable income should be calculated was "made casually and without analysis," and can be dismissed as mere dicta. Instead, I believe the statutory analysis undertaken by the Ninth Circuit in *Kagenveama* provides important guidance for the interpretation of § 1325(b)(2) and (b)(3).

In *Kagenveama,* the Ninth Circuit was confronted, as we are here, with interpreting a subsection of § 1325(b) that contains an imbedded definition in a following subsection. It did not read the sections sequentially. Rather, the court held that the definition

of "disposable income" in § 1325(b)(2) gave meaning to the phrase "projected disposable income" in § 1325(b)(1)(B). 541 F.3d at 873. The *Kagenveama* court refused to "de-couple 'disposable income' from the 'projected disposable income' calculation simply to arrive at a more favorable result for unsecured creditors, especially when the plain text and precedent dictate[d] the linkage of the two terms." *Id.* at 875.

I agree with the courts that find the most natural reading of § 1325(b)(3) "commands the application of Section 707(b)(2)(A) and (B) to determine the meaning of the amounts 'reasonably necessary to be expended'" under § 1325(b)(2). *In re Burbank*, 401 B.R. 67, 73 (Bankr. D.R.I. 2009) (*citing In re Quigley*, 391 B.R. 294, 299 (Bankr. N.D. W.Va. 2008)). Because § 1325(b)(3) contains the definition of "amounts reasonably necessary to be expended," it must be read to give meaning to what is to be deducted by an above median-income debtor in order to determine disposable income. As one bankruptcy court correctly analyzed § 1325(b)(2) and (b)(3):

> As with "disposable income," the term "amounts reasonably necessary to be expended" appears only twice in § 1325; once in § 1325(b)(2) and then in § 1325(b)(3). If the Court were to require an additional requirement that the expense also be necessary for a debtor's "maintenance or support," it would likewise render as surplusage the clear direction in § 1325(b)(3) as to how "amounts

> reasonably necessary to be expended" *shall* be determined.

In re Smith, 401 B.R. 469, 474 (Bankr. W.D. Wash. 2008).

Another court noted, "§ 1325(b)(3) states that the amounts determined to be reasonably necessary under § 1325(b)(2) *shall* be determined *in accordance with* § 707(b)(2)(A) and (B) – period. The term 'reasonably necessary' in § 1325(b)(3) is not superfluous – it is the very term that this section defines. For that reason, . . . courts may [not] conduct a separate 'reasonably necessary' analysis beyond § 707(b)(2)." *In re Van Bodegom Smith,* 383 B.R. 441, 448 (Bankr. E.D. Wis. 2008) (ultimately holding that payments on surrendered collateral are not "scheduled as contractually due" under § 707(b)(2)(A)(iii)(I) and, therefore, cannot be deducted in a debtor's means test calculation).

I do not agree that § 1325(b)(2) and (b)(3) should be read sequentially. The statutory analysis put forth by the majority, which reads § 1325(b)(2) and (3) sequentially, essentially adds language to § 1325(b)(3) to read "*after it is determined the expense is reasonably necessary, then* the amounts reasonably necessary to be expended shall be determined in accordance with § 707(b)(2)."

I cannot join my colleagues in an interpretation that upends the statutory inclusion of the means test in chapter 13, reverting back to the pre-BAPCPA judicial discretion as to what expenses of a debtor are

reasonably necessary. *See Kagenveama,* 541 F.3d at 874 (deliberate departure from the pre-BAPCPA disposable income calculation was so that debtors would "be subject to clear, defined standards, no longer left to the whim of a judicial proceeding" (citation omitted)). The majority contends the discretion of the bankruptcy court, under its analysis, is only to hold debtors to the consequences of their decisions about what assets they retain or surrender; however, the reality of the majority's interpretation of the statute is that bankruptcy courts will have the discretion to make determinations about what expenses are "reasonably necessary."

While I sympathize with the majority's desire for a common-sense solution to the problem created by incorporating the means test into the chapter 13 above median-income debtor's calculation of disposable income, I do not believe it is the role of the judiciary to remedy outcomes that do not comport with our view of common sense. *See Id.* at 875 ("If the changes imposed by BAPCPA arose from poor policy choices that produced undesirable results, it is up to Congress, not the courts, to amend the statute.").

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: **MELISSA J. STINE**,

Debtor

- - - - - - - - - - -

RICK A. YARNALL,

Appellant

v.

MELISSA J. STINE; HAINES & KRIEGER, LLC,

Appellees

BAP No.: **NV-08-1335-MoJuH**

Bankr. No.: 08-15414-LBR

Chapter 13

October 5, 2009

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for Nevada – Las Vegas.

THIS CAUSE came on to be heard on the record from the above court.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is REVERSED.

Honorable Judge Eileen W. Hollowell DISSENTS.

FOR THE PANEL,

Susan M Spraul
Clerk of Court
By: Vincent Barbato, Deputy Clerk

Date: October 5, 2009

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: **MELISSA J. STINE**, Debtor - - - - - - - - - - - RICK A. YARNALL, Appellant v. MELISSA J. STINE; HAINES & KRIEGER, LLC, Appellees	BAP No.: **NV-08-1335** Appeal Reference No.: 08-23 Bankr. No.: S-0815414-LBR Chapter 13 March 12, 2009

CONDITIONAL ORDER OF WAIVER
(Brief and Oral Argument)

Court records indicate that the Appellees brief have NOT been filed with the Bankruptcy Appellate Panel which was due *March 2, 2009*. The appellees brief will now be due **FRIDAY, MARCH 20, 2009**.

A party who fails to file a brief within the time provided, or within the time as extended pursuant to a motion, can not file a brief or appear at oral argument unless permitted to do so by a judge of the Panel.

The Panel will allow the Appellees to file its brief if it does so within EIGHT (8) days of the file stamped date of this order. If the Appellees fails to timely file

and serve this brief, the Appellees will have waived its right to file a brief and to appear at oral argument.

Harold S. Marenus, BAP Clerk

By: Vincent Barbato, Deputy Clerk
Filed and entered: March 12, 2009

cc: All Parties

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: FRANCISCO J. MARTINEZ; MELISSA J. STINE; ALEX WATHEN, Debtors.	BAP Nos. NV-08-1332 NV-08-1335 NV-08-1340 (Related Appeals) Bk. Nos. 08-14571-BAM 08-15414-LBR 08-15133-MKN
RICK A. YARNALL, Chapter 13 Trustee, Appellant, v. FRANCISCO J. MARTINEZ; MELISSA J. STINE; ALEX WATHEN; HAINES & KRIEGER, LLC, Appellees.	**ORDER ALLOWING JOINT BRIEFING** (Filed Feb. 25, 2009)

Before: Randall L. Dunn, Bankruptcy Judge.

These related appellate case files have been reviewed. Although the orders on appeal were entered in the separate bankruptcy cases, the matters were heard together at the bankruptcy court and all involve the same issue of law. There is but one appellant, the Chapter 13 Trustee. All appellees are represented on appeal by appellee Haines & Krieger, LLC.

Therefore, in order to simplify the appellate review process, appellees may file a unified joint responsive brief, if they so choose. If a unified brief is filed on behalf of all appellees, appellant's optional reply brief should be a joint brief covering all three appeals as well. In order to have sufficient copies for the BAP files, the BAP will need a total of seven copies of any joint brief and excerpts (one for each of the three appeal case files and four copies for chambers).

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: **MELISSA J. STINE**, Debtor - - - - - - - - - - - - RICK A. YARNALL, Appellant v. MELISSA J. STINE; HAINES & KRIEGER, LLC, Appellees	BAP No.: **NV-08-1335** Appeal Reference No.: 08-23 Bankr. No.: S-08-15414-LBR Chapter 13 December 26, 2008

BRIEFING ORDER
(Prompt Action Required)

Unless otherwise ordered by this court, the parties to this appeal shall timely complete all of the briefing deadlines set forth below. Failure of the parties to comply with these deadlines may result in dismissal of this appeal or in the imposition of other sanctions. These deadlines control and supersede any briefing deadlines contemplated by the Federal Rules of Bankruptcy Procedure ("FRBP").

Last day for appellant(s) to file opening brief and appendix:[*DUE DATE: MONDAY, FEBRUARY 9, 2009*].

Last day for appellee(s) to file responsive brief and appendix: Twenty-One days after service of appellant's opening brief.

Last day for appellant(s) to file optional reply brief: Fourteen days after service of appellee's reply brief.

Requirements for filing a brief, an appendix (excerpts of the record), and required certificates are set forth in FRBP 8009 and 8010, and Ninth Circuit BAP Rules 8009(a)-1, 8009(b)-1, and 8010(a)-1. Length of briefs is governed by Ninth Circuit BAP Rule 8010(c)-1. *See also* 9th Cir. BAP Rule 8006-1 (describing requirements for the inclusion of transcripts in the excerpts of the record).

The parties generally should expect that oral argument will occur shortly after briefing is completed. Please refer to the attached materials regarding advance consideration of issues concerning oral argument.

FAILURE OF APPELLANT TO TIMELY PROVIDE AN ADEQUATE OPENING BRIEF AND ADEQUATE EXCERPTS OF THE RECORD IN COMPLIANCE WITH THE GOVERNING RULES MAY RESULT IN DISMISSAL OF THE APPEAL, OR IN SUMMARY AFFIRMANCE OF THE RULING ON APPEAL. *See Morrissey v. Stuteville* (*In re Morrissey*), 349 F.3d 1187 (9th Cir. 2003).

FOR THE PANEL,

Harold S. Marenus
Clerk of Court

SUMMARY OF REQUIREMENTS FOR BRIEFS AND EXCERPTS OF THE RECORD

This Summary is intended to help the parties file their briefs and appendix in the proper format, but it is not a substitute for reading and complying with all of the procedural rules listed in the Briefing Order, which rules govern the format and content of each brief and appendix. Briefs that do not comply with national and local rules may not be accepted for filing. Your attention is particularly called to the following requirements:

LENGTH – Thirty pages for the opening briefs of appellant and appellee. Twenty pages for appellant's reply brief, if any.

NUMBER – A signed original and four copies of all briefs; five copies of the excerpts of the record.

COVERS – Appellant's opening brief – BLUE; appellee's brief – RED. appellant's reply brief – GRAY; all excerpts of the record – WHITE.

APPENDIX (Excerpts of The Record) – The parties are required to include copies of all relevant documents from the bankruptcy court record, including transcripts, in their excerpts.

FORMAT OF APPENDIX – The Appendix must comply with the requirements of 9th Cir. BAP Rule 8009(b)-1. FAILURE TO TAB ALL DOCUMENTS IN THE APPENDIX, TO CONTINUOUSLY PAGINATE THE ENTIRE APPENDIX, AND TO PROVIDE A TABLE OF CONTENTS IN THE FORM SPECIFIED

IN THE ABOVE-REFERENCED RULE MIGHT SEVERELY HAMPER THE PANEL'S REVIEW OF THE ISSUES ON APPEAL.

CERTIFICATES – Both appellant's and appellee's opening brief must contain a Certificate of Interested Parties. Appellants brief must also contain a Certificate of Related Cases.

CALCULATION OF TIME – Briefs are deemed filed on the day of mailing. FRBP 8008(a).

ADVANCE CONSIDERATION OF ISSUES CONCERNING ORAL ARGUMENT

While the parties are briefing, the BAP is considering where and when to set oral argument. Because the BAP seeks to set argument as soon as practical after briefing is completed, any stipulations, motions or notices concerning oral argument should be filed at the earliest possible time, generally with a party's first brief. While appeals typically are set for hearing in the bankruptcy district from which the appeal arose whenever feasible, the parties may file a stipulation or motion requesting an alternative hearing location or a hearing by telephone or video conference. The parties also may file a stipulation or motion to submit their appeal on the briefs and record, thereby waiving oral argument.

All parties should carefully review the dates on the BAP's annual hearing calendar located on the BAP's

website: http://www.ce9.uscourts.gov/bap. This calendar contains dates that the BAP judges have set aside for argument, and it is likely that your appeal will be set for hearing on one of these dates. If a party knows or suspects that he or she will be unavailable on one of these dates, he or she should file as soon as possible a notice of unavailability, stating the dates on which he or she is unavailable. Once a case has been scheduled for argument, continuances and requests to change time or place are rarely granted.

CERTIFICATE OF MAILING

The undersigned, deputy Clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document to which this certificate is attached was transmitted this date to all parties of record to this appeal, to the United States Trustee and to the Clerk of the Bankruptcy Court.

By: Vincent Barbato, Deputy Clerk
Date: December 26, 2008

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit

125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

RE: MELISSA J. STINE

Appellant:	Rick A. Yarnall, Ch 13 Trustee	Appeal Reference No.: 8-23
BAP No.:	**NV-08-1335**	(RE: *Notice of Appeal*
Bk. No.:	S-08-15414-LBR	*Filed on 12/12/08*)

OPENING LETTER

Notice of Appeal in this case has been received by the Bankruptcy Appellate Panel (BAP) and assigned the case number above. All papers filed with the BAP should be in the form of an original and three copies.

The BAP docket and other court information is available through the National PACER system. http://pacer.bap09.uscourts.gov

Enclosed are the 9th Cir. BAP Rules governing practice before the BAP. Appeals are also governed by Parts VIII and IX of the Federal Rules of Bankruptcy Procedure (F.R.B.P.), and some parts of the Federal Rules of Appellate Procedure (F.R.A.P.) See 9th Cir. BAP Rule 8018(b)-1.

Pursuant to 9th Cir. Rule 8001(a)-1, please immediately send the BAP Clerk a copy of the signed and

entered order or judgment being appealed if it was not attached to your notice of appeal.

After a Notice of Appeal has been filed, the parties' next step in prosecuting this appeal is compliance with F.R.B.P 8006 and 8007, which require Appellant to file within 10 days in the bankruptcy court a designation of the record, statement of issues on appeal, and a notice regarding the ordering of transcripts. Under these rules Appellee may also file a supplemental designation of the record and order transcripts. The party ordering the transcripts must make satisfactory arrangements for payment of their costs.

Even if transcripts are not ordered, Appellant is required to file with the bankruptcy court a notice stating that none are required. See also 9th Cir. BAP R. 8006-1.

The parties should note that the designation of the record under F.R.B.P. 8006 is a necessary procedural step in prosecuting an appeal and the parties may not later include in their excerpts of the record documents which have not been designated.

The record and bankruptcy file remain with the Clerk of the bankruptcy court and the Panel reviews only those items which are reproduced and included in the excerpts of the record filed at the time of the briefs. While the Panel may call up the formal record, in practice this rarely occurs.

Further, it is the parties' responsibility to monitor the appeal to ensure that transcripts are timely filed and the record is completed in a timely manner. Under F.R.B.P. 8007(a), the court reporter is required to file transcripts within 30 days of receipt of the parties' request, unless an extension has been granted.

After the record is complete, the Clerk of the bankruptcy court will send a Certificate of Record, sometimes referred to as a Certificate of Readiness or Certificate of Transcripts, to the BAP Clerk. This triggers the issuance of the briefing schedule by the BAP clerk. The briefing schedule contains time deadlines and instructions regarding filing of briefs. However, the parties should be aware that the time periods set forth in the briefing schedule are relatively short and extensions of time greater that 15 days are granted only based on a showing of good cause. See F.R.B.P. 8009 and 9th Cir. BAP R. 8009(a)-1.

Appeals are set for hearing in the bankruptcy district from which the appeal arose whenever feasible. To expedite the appeal or if the parties feel argument is unnecessary, they may file a stipulation or motion to submit their appeal on the briefs and record, thereby waiving oral argument. The Panel will also consider stipulations requesting an alternative hearing location or hearing by telephone conference. Such motions should be filed at the earliest possible scheduled date, generally with the opening brief, as once a case has been scheduled for argument, continuance and request of change time and place are rarely granted.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this certificate appears was transmitted this date to all parties of record to this appeal.

By: Vincent Barbato, Deputy Clerk
Date: December 26, 2008

U.S. Bankruptcy Appellate Panel of the Ninth Circuit

125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

To: Clerk, Bankruptcy Court – Las Vegas, Nevada

Debtor(s): **MELISSA J. STINE**
BAP No.: **NV-08-1335**
Bk. Ct. No.: S-08-15414-LBR

Appeal Reference No.: 08-23 (RE: *Notice of Appeal Filed on 12/12/08*)

The Bankruptcy Appellate Panel has received and docketed the notice of appeal referenced in the attached transmittal. The BAP case number is indicated above for your information.

If completion of the record has been delayed, please advise us as to the cause of the delay by completing the following checklist and sending a copy of this letter back to us:

IF THE RECORD ON APPEAL IS COMPLETE, PLEASE SEND THE CERTIFICATE OF READINESS

Harold S. Marenus, BAP Clerk

By: Vincent Barbato, Deputy Clerk
Date: December 26, 2008

A) REASONS WHY THE RECORD HAS NOT BEEN COMPLETED. THE FOLLOWING ITEMS HAVE NOT BEEN FILED:

[ ] No Filing Fees paid
[ ] No Designation of Record
[ ] No Statement of Issues
[ ] No Notice Regarding the Transcript
[ ] No Reporter's Transcript(s)

Reporter name: _____
phone: _____
Judge: _____
Transcript date(s): _____

[ ] No Transcript Fees paid
[ ] Extension of Time Granted to Reporter:
New deadline: _____
[ ] Other: _____

B) DEPUTY CLERK PROCESSING THIS APPEAL

1. Name: _____
2. Phone: _____
3. Date: _____

_____

[SEAL]

Entered on Docket
December 22, 2008

/s/ Linda B. Riegle
Hon. Linda B. Riegle
United States
Bankruptcy Judge

RICK A YARNALL
Chapter 13 Bankruptcy Trustee
Marianne Gatti, Esq.
Nevada Bar Number 7717
701 Bridger Ave., Ste 820
Las Vegas, NV 89101
(702) 853-4500
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Electronically Filed on 12-12-08

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re: MELISSA J. STINE Debtor(s).	BK-S-08-15414-LBR Chapter 13 Date: October 30, 2008 Time: 4:00 p.m.

ORDER OVERRULING TRUSTEE'S OBJECTIONS TO CONFIRMATION

Debtor's Chapter 13 Plan Confirmation hearings and Chapter 13 Trustee Rick A. Yarnall's Objections to Confirmation having come on for hearing in the above-entitled Court on October 30, 2008 at 4:00 p.m., with Marianne Gatti, Esq. appearing on behalf of Rick A. Yarnall, David Krieger, Esq. appearing on behalf of Debtors, argument having been heard, and

based upon the papers and pleadings on file herein, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Trustee's Objections to Confirmation regarding lines 47 and 48 of the form 22C are hereby OVERRULED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Stipulated Facts entered into by the parties shall be the Findings of Facts incorporated in the Court's ruling;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Conclusions of Law as stated on the record shall be incorporated as though set forth herein pursuant to FRBP 7052;

IT IS SO ORDERED.

Submitted by:

/s/ M Gatti Dated: 12-12-08
Marianne Gatti, Esq.
Nevada Bar No. 7717
Attorney for Rick A. Yarnall,
Chapter 13 Bankruptcy Trustee

Approved / Disapproved

/s/ David Krieger Dated: 10/11/08
David Krieger, Esq.
Nevada Bar No. 9086
Attorney for Debtors

In accordance with LR 9021, counsel submitting this document certifies as follows (check one):

___ The court has waived the requirement of approval under LR 9021.

___ No parties appeared or filed written objections, and there is no trustee appointed in the case.

_X_ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

David Krieger, Esq. approved _X_ disapproved ___ failed to respond ___

###

[SEAL]

Entered on Docket
December 05, 2008

/s/ Linda B. Riegle
Hon. Linda B. Riegle
United States
Bankruptcy Judge

RICK A YARNALL
Chapter 13 Bankruptcy Trustee
Marianne Gatti, Esq.
Nevada Bar Number 7717
701 Bridger Ave., Ste 820
Las Vegas, NV 89101
(702) 853-4500
RAY13mail@lasvegas13.com

Electronically Filed on 12-4-08

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re: MELISSA J. STINE Debtor(s).	BK-S-08-15414-LBR Chapter 13 Date: November 20, 2008 Time: 1:30 p.m.

ORDER CONFIRMING THE DEBTOR(S) PLAN #2 and AWARDING FEES TO THE DEBTOR(S) ATTORNEY

The confirmation of the Debtor(s) Plan and the allowance of Debtor attorney fees, having come on for hearing before the United States Bankruptcy Court, and there appearing Marianne Gatti, Esq., Staff Attorney for the Chapter 13 Trustee and David

Krieger, Esq. appearing on behalf of debtor(s) and with good cause appearing;

IT IS HEREBY ORDERED that Trustee's Objections to Confirmation have been overruled by the Court after a hearing held on October 30, 2008. A true and correct copy of the proposed Order Overruling Objections to Confirmation is attached hereto for the Court's reference as Exhibit 1, and shall be fully incorporated as though fully set forth herein;

IT IS FURTHER ORDERED that the Court finds that Debtor(s) have filed all documentation required by 11 U.S.C. § 521(a)(1) and the requirements for Confirmation pursuant to 11 U.S.C. § 1325 have been met;

IT IS FURTHER ORDERED that the DEBTOR(S) CHAPTER 13 PLAN #2, attached hereto, is confirmed;

IT IS FURTHER ORDERED that, pursuant to 11 U.S.C. § 330, the fees in the amount of $4,674.00 of which $1,400.00 was paid to such attorney prior to the filing of the petition and the balance of $3,274.00 which shall be paid by the Trustee pursuant to the Plan: ☒ shall be approved. OR ☐ shall not be approved until after a separate notice and hearing.

IT IS SO ORDERED.

Submitted by:

/s/ M Gatti Dated: 12-4-08
Marianne Gatti, Esq.
Nevada Bar No. 7717
Attorney for Rick A. Yarnall,
Chapter 13 Bankruptcy Trustee

Approved / Disapproved

/s/ David Krieger Dated: 12/4/08
David Krieger, Esq.
Nevada Bar No. 9086
Attorney for Debtors

In accordance with LR 9021, counsel submitting this document certifies as follows (check one):

___ The court has waived the requirement of approval under LR 9021.

___ No parties appeared or filed written objections, and there is no trustee appointed in the case.

_X_ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

David Krieger, Esq. approved ___ disapproved ___
failed to respond ___

###

187 (2)

No. 10-1212

In The

Supreme Court of the United States

MELISSA J. STINE,

Petitioner,

v.

RICK A. YARNALL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MARIANNE GATTI
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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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STATEMENT OF THE CASE

The parties do not dispute the facts in this matter. Petitioner Stine prevailed in having the Bankruptcy Court confirm her Chapter 13 plan over the objection of respondent, Chapter 13 Trustee Yarnall. When Trustee Yarnall appealed the order confirming the plan, debtor Stine failed to appear or object before the Bankruptcy Appellate Panel ("BAP") of the Ninth Circuit Court of Appeals. She designated no items for inclusion in the record on appeal, and filed no papers of any sort. The BAP issued a conditional order of waiver granting petitioner, and the other appellees in the proceedings, an additional period of time in which to file a reply brief. The conditional order provided that, unless petitioner complied in a timely manner, she waived her right to file a brief or appear at oral argument. Petitioner persisted in failing to file a reply brief despite being granted an extension of time in which to do so, and the conditional order became final. Thus Petitioner Stine, knowingly and with notice, waived her right to participate.

Trustee Yarnall prevailed at the BAP and obtained a reversal of the bankruptcy court order confirming debtor Stine's plan. When the debtor appealed to the Ninth Circuit Court of Appeals, the Circuit Court dismissed her appeal on the grounds that "attendance and objection" at the prior proceedings were "prerequisites" for standing to appeal. Debtor Stine then filed her petition for writ of certiorari to review the judgment of the Ninth Circuit.

REASONS FOR DENYING THE WRIT OF CERTIORARI AND AFFIRMING THE JUDGMENT OF THE NINTH CIRCUIT

THE NINTH CIRCUIT COURT OF APPEALS WAS CORRECT IN DISMISSING DEBTOR STINE'S APPEAL FOR FAILURE TO ATTEND AND OBJECT IN THE PROCEEDINGS BEFORE THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

On issues relating to compliance with procedure, the Ninth Circuit Court of Appeals has found consistently that a party in bankruptcy proceedings must meet procedural requirements or face dismissal. The Ninth Circuit, together with the Seventh and Tenth Circuits, has held that appearance and objection are prerequisites for standing as a "person aggrieved" in bankruptcy appeals.

In essence, petitioner has advocated a laissez-fair approach to appellate practice in which a party may, without penalty or excuse, abandon participation at the BAP level or district court exercising appellate jurisdiction over bankruptcy proceedings. Having failed to submit a brief to the BAP, a party would still have the recourse of appealing to the circuit court with no adverse consequences. In this scenario, Petitioner has envisioned an appellate system in which noncompliance has no downside, and compliance confers few advantages.

The Ninth Circuit has required appearance and participation as requirements for appellate standing even before Congress amended the Bankruptcy Act in 1938 to include the "person aggrieved" test in section 39(c). 11 U.S.C. § 67(c) (repealed 1978). The decision

of a district court in the circuit, *In re Peppers Fruit Co.*, 24 F. Supp. 119 (D. S.D. Ca. 1938), applied the normal federal "party or privy" test for standing and stated that it "felt that, in the interest and economy and efficiency of administration of bankruptcy estates, reviews from referees' orders, at least those orders which are made after notice, should be limited to applications by parties who have appeared at the hearing before the referee and participated therein." *Id.* at 121-22, cited by *In re Commercial Western Finance Corp.*, 761 F.2d at 1334-35. The requirement of attendance and objection, after due notice, as a limitation on the people who have standing to appeal in the bankruptcy system has been recognized by scholarly commentary. R. Levin, *Bankruptcy Appeals*, 58 N.C.L.Rev. 967, 978 (1980). Petitioner Stine does not claim that she lacked notice of the requirement to file a reply brief before the BAP.

Petitioner argues that her appeal to the Ninth Circuit Court of Appeals should not have been dismissed because the relevant issues and record had been fully set forth in the bankruptcy court. However, any issues or portions of the record Petitioner desired the BAP to address were not set forth before the BAP. By failing to file a reply brief in a timely manner, and persisting in this failure after the bankruptcy panel granted her additional time to comply, Petitioner waived the right to file a brief, raise additional issues or complain about the result. Petitioner's issues were not properly before the Court of Appeals because she never briefed them before the Bankruptcy Appellate Panel. *See In re Pine Mountain, Ltd.*, 80 B.R. at 173; *Energrey Enters.*, 119 B.R. at 741. Petitioner's willful noncompliance with

appellate procedure offered the Ninth Circuit no reasonable alternative but to dismiss her appeal.

Trustee contends that the failure to participate at the lower level appellate court waives any standing to bring this appeal before the Ninth Circuit. Parties should not be allowed to simply sit back and watch to determine if they are going to be happy with the outcome of an appeal. The Ninth Circuit Court has likened this type of behavior to the industry Nevada is known for:

> Federal courts are not run like a casino game in which players may enter and exit on pure whim. A defaulted party may not re-enter litigation, particularly on appeal, on sheer caprice. It must follow proper procedure to set aside the default.

In re Lam, 192 F.3d 1309, 1311 (C.A.9, 1999).

The context of the appeal on *Lam* was a creditor that "appeals the merits of an intermediate appellate decision although it did not bother to appear in that appeal." *Id.* at 1311. We have a similar situation in this appeal where the debtor did not participate at the BAP, but then appealed that decision to the Ninth Circuit, which dismissed the appeal for Debtor's failure to participate at the BAP level.

Also similar to the cases before the Court in this matter, the Illinois District Court in *In re Schwinn* found that a party on notice to a proceeding who chooses not to participate cannot later complain about the result:

> When a party to litigation receives notice that a matter will be heard, it is his duty to appear

> at the hearing and present to the court evidence and legal authorities which will be of aid to the court in making its decision. If he does not do so, the court must make its decision without the benefit of any evidence which such person might have made available, and the court must act upon the presumption that persons who are absent are not interested in the matter before it or will be satisfied with such decision as the court may make. To permit persons who did not participate in proceedings of which they are on notice to complain of the result of such proceedings would cause unlimited confusion and even disrespect of the courts and their authority.
>
> *In re Schwinn*, 209 B.R. at 892, quoting *In re Mifflinburg Body Co.*, 54 F.Supp. 560, 561 (M.D.Pa.1944).

Debtor Appellant in this case does not and cannot claim she did not have notice of the BAP appeal. Nor can she claim she did not have the opportunity to participate in the BAP appeal. Rather she *chose* not to participate. At this late juncture, she should not be permitted to suddenly re-appear because the last result was not to her liking. Where would the line be drawn if an appellant is permitted to just sit back and watch?

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied and the dismissal by the Ninth Circuit Court of Appeals should remain undisturbed.

Respectfully submitted,

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188

No. 10-1212

Supreme Court, U.S.
FILED
MAY 16 2011

In The
Supreme Court of the United States

MELISSA J. STINE,

Petitioner,

v.

RICK A. YARNALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

Respondent Yarnall, in his Brief in Opposition ("Opp."), has presented a second question for review, namely, whether an appeal should be dismissed for noncompliance with the procedural requirements of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules").

Since enactment of the Bankruptcy Code of 1978, the federal circuits have been clearly divided with respect to preservation of issues on appeal under Federal Rules of Bankruptcy Procedure 8006, 8009 and 8010 ("Rules 8006, 8009 and 8010").

The First, Third, Fifth and Ninth Circuits have held that, in bankruptcy appeals, any claim not included in the statement of issues under Rule 8006 or Rule 8010 is waived. But the Second, Sixth and Eleventh Circuits have ruled that the appellate court may exercise broad discretion to infer issues from the bankruptcy record and Rule 8006 or Rule 8010 statement even though a party has failed to list those issues.

The Brief in Opposition states in part:

> Petitioner argues that her appeal to the Ninth Circuit Court of Appeals should not have been dismissed because the relevant issues and record had been fully set forth in the bankruptcy court . . . [but] Petitioner's issues were not properly before the Court of

QUESTIONS PRESENTED – Continued

> Appeals because she never briefed them before the Bankruptcy Appellate Panel. *See In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987), at 173; *Energrey Enters. v. Oak Creek Energy Sys.*, 119 B.R. 739 (D. E.D. Ca. 1990), at 741. Petitioner's willful noncompliance with appellate procedure offered the Ninth Circuit no reasonable alternative but to dismiss her appeal.

Opp. 3-4.

The cases cited here by Respondent, *In re Pine Mountain* and *Energrey Enterprises*, did not involve the prerequisites for standing of a "person aggrieved," and nowhere considered the question of a party's forfeiting its standing to appeal. Rather, those decisions held that an issue is not preserved for appeal under Bankruptcy Rule 8006 unless the appellant includes the issue in its statement of issues on appeal.

The second question presented is:

Whether an issue is preserved for appeal because it is argued in the bankruptcy court and inferable from the Rule 8006 or Rule 8010 statement, or whether an issue cannot be considered if it is not listed explicitly in the statement of issues.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

A. THE SPLIT BETWEEN THE CIRCUITS ON STANDING TO APPEAL IN BANKRUPTCY PROCEEDINGS NEEDS RESOLUTION 1

B. THERE IS A SHARP CONFLICT BETWEEN CIRCUITS ON WHETHER AN ISSUE IS PRESERVED FOR APPEAL IF IT IS ARGUED IN THE BANKRUPTCY COURT AND INFERABLE FROM THE RULE 8006 OR RULE 8010 STATEMENT, OR WHETHER AN ISSUE MUST BE LISTED EXACTLY IN THE STATEMENT OF ISSUES IN ORDER TO BE REVIEWED 4

C. THE NINTH CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION IN SUMMARILY DISMISSING DEBTOR STINE'S APPEAL 7

CONCLUSION 11

APPENDIX

Federal Rule of Bankruptcy Procedure 8006 ..... App. 1

Federal Rule of Bankruptcy Procedure 8009 ..... App. 2

Federal Rule of Bankruptcy Procedure 8010 ..... App. 4

TABLE OF AUTHORITIES

Page

CASES

Energrey Enters. v. Oak Creek Energy Sys., 119 B.R. 739 (D. E.D. Ca. 1990) 5

In re Bracewell, 322 B.R. 698 (D. M.D. Ga. 2005) 6

In re Cohoes Indus. Terminal, Inc., 90 B.R. 67 (D. S.D. N.Y. 1988) 6

In re Commercial Western Finance Corp., 761 F.2d 1329 (9th Cir. 1985) 2

In re Donovan, 871 F.2d 807 (9th Cir. 1989) 8

In re Ernst, Inc., 2 B.R. 757 (D. S.D. N.Y. 1980) 3

In re Fitzsimmons, 920 F.2d 1468 (9th Cir. 1990) 8, 9, 10

In re Harris, 464 F.3d 263 (2d Cir. 2006).....8, 9

In re Hill, 775 F.2d 1385 (9th Cir. 1985).....8, 10

In re Pine Mountain, Ltd., 80 B.R. 171 (B.A.P. 9th Cir. 1987).....5

In re Schultz Mfg. Fabricating Co., 956 F.2d 686 (7th Cir. 1992) 2

In re Trans World Airlines, Inc., 145 F.3d 124 (3d Cir. 1998).....5

Intelligent Mailing Systems v. Ascom Hasler Mailing Systems, Inc., 2006 U.S. Dist. LEXIS 6488 (D. N.D. Ohio 2006).....4, 5, 7

TABLE OF AUTHORITIES – Continued

Page

Int'l Trade Administration v. Rennselaer Polytechnic Inst., 936 F.3d 744 (2d Cir. 1991) 3

Joelson v. Brown (In re Brown Family Farms), 872 F.2d 139 (6th Cir. 1998) 6

Maryland Sav. Bank v. Michels (In re Michels), 286 B.R. 684 (B.A.P. 8th Cir. 2002) 3

Resolution Trust Corp. v. SPR Corp. (In re SPR Corp.), 45 F.3d 70 (4th Cir. 1995) 8, 9

Snap-On Tools, Inc. v. Freeman (In re Freeman), 956 F.2d 252 (11th Cir. 1992) 6

Weston v. Mann (In re Weston), 18 F.3d 860 (10th Cir. 1994) 2

White v. Univision of Va. (In re Urban Broadcasting Corp.), 304 B.R. 263 (D. E.D. Va. 2004) 2

White v. Univision of Virginia Inc. (In re Urban Broadcasting Corp.), 401 F.3d 236 (4th Cir. 2005) 1, 2, 3

Zimmerman v. Jenkins (In re GGM, P.C.), 164 F.3d 1026 (5th Cir. 1999) 5

RULES

Federal Rule of Bankruptcy Procedure 8001 .....6, 8, 9

Federal Rule of Bankruptcy Procedure 8006 .....4, 5, 6, 7, 8

Federal Rule of Bankruptcy Procedure 8009 4

Federal Rule of Bankruptcy Procedure 8010 .....4, 5, 7

INTRODUCTION

Petitioner Stine's case falls at the crossroads of conflicting holdings of the federal circuits. The circuits are split regarding the standing to appeal of a "person aggrieved" and dismissal of appeals for noncompliance with the Federal Rules of Bankruptcy Procedure. Petitioner seeks review of the summary dismissal of her appeal by the Ninth Circuit Court of Appeals.

A. THE SPLIT BETWEEN THE CIRCUITS ON STANDING TO APPEAL IN BANKRUPTCY PROCEEDINGS NEEDS RESOLUTION

The Courts of Appeals are evenly divided on the issue of appellate standing in bankruptcy. The Seventh, Ninth and Tenth Circuits have ruled that a party needs to appear and object in the court below in order to have standing to appeal. In stark contrast, the Second and Fourth Circuits, and the Bankruptcy Appellate Panel ("BAP") of the Eighth Circuit, have held that a party has standing to appeal from an adverse judgment even without participating fully at every stage of the related bankruptcy proceedings. The answer to a fundamental question such as appellate standing should not vary widely between federal courts.

The split between the circuits on appellate standing was summarized in *White v. Univision of Virginia Inc. (In re Urban Broadcasting Corp.)*, 401 F.3d 236 (4th Cir. 2005). In the Urban Broadcasting chapter 7 bankruptcy, Theodore White ("White") owned 55% of

the shares of the debtor corporation, and Univision of Virginia Inc. ("Univision") owned the remaining 45% of the shares. Unopposed by White, the bankruptcy court approved Univision's claim at a noticed hearing. After White appealed the bankruptcy court's order, the district court concluded that White was not a "person aggrieved" and had no standing to appeal because the bankruptcy court order specifically barred him from appealing due to his lack of participation, and further because he filed no objection to Univision's claim and failed to appear and object at the hearing on the claim. *White v. Univision of Va. (In re Urban Broadcasting Corp.)*, 304 B.R. 263, 270-71 (D. E.D. Va. 2004). The Fourth Circuit Court of Appeals characterized the district's court holding as consistent with the decisions of the Seventh, Ninth and Tenth Circuits:

> [T]he district court relied on cases from other circuits and concluded that the Fourth Circuit would likely conclude, "consistent with the Seventh, Ninth, and Tenth Circuits, . . . that attendance and objection at the bankruptcy court hearing are pre-requisites to appellate standing" under the "person aggrieved" test. *Id.* at 272. *See, e.g.*, *Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994); *In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 690 (7th Cir. 1992); *In re Commercial Western Finance Corp.*, 761 F.2d 1329, 1335 (9th Cir. 1985).

Urban Broadcasting Corp., 401 F.3d at 243.

In siding with the Second Circuit and Eighth Circuit BAP, the Fourth Circuit held that standing to appeal in bankruptcy proceedings depends wholly on whether the party is directly affected pecuniarily by an adverse bankruptcy court order:

> *But see, e.g., Int'l Trade Administration v. Rennselaer Polytechnic Inst.*, 936 F.2d 744, 748 (2d Cir. 1991) (holding that a "person aggrieved" has standing to appeal whether or not that person sought intervention); *Maryland Sav. Bank v. Michels (In re Michels)*, 286 B.R. 684, 690 (B.A.P. 8th Cir. 2002) (concluding that a creditor had standing to appeal a confirmation order even though it failed to file a timely proof of claim); *In re E.C. Ernst, Inc.*, 2 B.R. 757, 761 (D. S.D. N.Y. 1980) (recognizing that the now-repealed Bankruptcy Act provision that originated the "person aggrieved" standard did not include any appearance requirement).

Urban Broadcasting Corp., 401 F.3d at 243. The Fourth Circuit concluded that White's standing to appeal was not negated by his noncompliance with the bankruptcy court order or his failure to appear or object at the hearing on Univision's claim. Nonetheless, the circuit court affirmed the district court's dismissal of the appeal on the grounds that an order of the bankruptcy court explicitly barred White from appealing after he failed to object or give evidence; and further, because White was not a "person aggrieved" because he suffered no direct and adverse pecuniary harm as a result of the bankruptcy court's approval of the disputed claim.

The prerequisites for standing to appeal in bankruptcy should be uniform among the federal circuits, and at present such uniformity is lacking.

B. THERE IS A SHARP CONFLICT BETWEEN THE CIRCUITS ON WHETHER AN ISSUE IS PRESERVED FOR APPEAL IF IT IS ARGUED IN THE BANKRUPTCY COURT AND INFERABLE FROM THE RULE 8006 OR RULE 8010 STATEMENT, OR WHETHER AN ISSUE MUST BE LISTED EXPLICITLY IN THE STATEMENT OF ISSUES IN ORDER TO BE REVIEWED

The federal circuits are divided on the obligations of the parties to list all their claims in the statement of issues required by Federal Rules of Bankruptcy Procedure 8006, 8009 and 8010 ("Rules 8006, 8009 and 8010"). The First, Third, Fifth and Ninth Circuits have held that any claim not included in the statement of issues is waived; the Second, Sixth and Eleventh Circuits have ruled that the appellate court may exercise broad discretion to infer issues from the record and pleadings.

The conflict between circuits has been summarized in *Intelligent Mailing Systems v. Ascom Hasler Mailing Systems, Inc.*, 2006 U.S. Dist. LEXIS 6488 (D. N.D. Ohio 2006). The *Intelligent Mailing Systems* court considered an argument by the appellee that certain issues were not preserved for appeal because they were not included in the Rule 8006 statement, and also because they were raised for the first time in appellant's opening brief. The court stated:

> No decisions within the Sixth Circuit have addressed the waiver of issues regarding Rule 8006, but the Fifth Circuit has adopted a strict rule that "even if an issue is argued in the bankruptcy court and ruled on by that court, it is not preserved for appeal under Bankruptcy Rule 8006 unless the appellant includes the issue in its statement of issues on appeal." *Zimmerman v. Jenkins (In re GGM, P.C.)*, 164 F.3d 1026, 1031-32 (5th Cir. 1999); see *Energrey Enters. v. Oak Creek Energy Sys.*, 119 B.R. 739 (D. E.D. Ca. 1990); *In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987). . . . And the Third Circuit, when considering the failure to specify an issue in a Rule 8006 statement, addressed both compliance with Rule 8006 as well as compliance with the briefing requirements of Rule 8010. See *In re Trans World Airlines, Inc.*, 145 F.3d 124, 132 (3d Cir. 1998) (finding that in addition to failing to specify the issue in a Rule 8006 statement appellant failed to comply with Rule 8010 by making scant references to the issue within the opening brief and by failing to specify whether the bankruptcy court had discussed the issue to any extent).

Intelligent Mailing Systems, 2006 U.S. Dist LEXIS 6488 at **9-10.

The district court in *Intelligent Mailing Systems* declined to follow the rigid rule established by the Third, Fifth and Ninth Circuits. Instead, the court

opted for the more responsive standard of the Second, Sixth and Eleventh Circuits:

> The Eleventh Circuit . . . applied a more flexible rule: "An issue that is not listed pursuant to [Rule 8006] and is not inferable from the issues that are listed is deemed waived and will not be considered on appeal." *Snap-On Tools, Inc. v. Freeman (In re Freeman)*, 956 F.2d 252, 255 (11th Cir. 1992). . . . Cf. *Joelson v. Brown (In re Brown Family Farms)*, 872 F.2d 139, 141-42 (6th Cir. 1988) ("Under Bankruptcy Rules 8001 and 8010, the district court could, within its discretion, deem [an issue] waived if it believed that the issues as presented and argued in the [appellate] brief did not effectively contest the [underlying determinations of the bankruptcy court].")
>
> The Court is more inclined to adopt the flexible rule applied within the Eleventh Circuit. "Thus, as long as an issue is inferable, then Rule 8006 'is not intended to bind either party to the appeal as to the issues that are to be presented.'" *In re Bracewell*, 322 B.R. 698, 701-02 (D. M.D. Ga. 2005) (quoting *In re Cohoes Indus. Terminal, Inc.*, 90 B.R. 67 (D. S.D. N.Y. 1988) at 70). Circumstances useful in determining whether an issue not listed in a Rule 8006 statement is inferable include: whether the issue was raised in the bankruptcy court (because an appellate court generally will not consider issues not adjudicated below); whether the issue requires the court to make any independent factual

> findings; and whether the issue presents unfair surprise to the other litigant. See *id.* at 702.

Intelligent Mailing Systems, 2006 U.S. Dist. LEXIS 6488 at **10-11.

Petitioner asks this Court to adopt the general rule of the Second, Sixth and Eleventh Circuits that failure to list an issue in the Rule 8006 statement or Rule 8010 statement need not constitute a waiver for purposes of appeal. Instead, the appellate court should exercise discretion in determining whether to infer an issue from the record and pleadings and consider alternatives to the extreme sanction of dismissal.

C. THE NINTH CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION IN SUMMARILY DISMISSING DEBTOR STINE'S APPEAL

Respondent Yarnall asserts in his Brief in Opposition:

> On issues relating to compliance with procedure, the Ninth Circuit Court of Appeals has found consistently that a party in bankruptcy proceedings must meet procedural requirements or face dismissal.

Op. 2. Respondent's position oversimplifies the standard for dismissal on the basis of non-compliance with procedural requirements. In the Ninth Circuit, as elsewhere, dismissing a bankruptcy appeal on procedural grounds, rather than reaching the merits

of the appeal, must be reviewed for abuse of discretion. *See, In re Hill*, 775 F.2d 1385, 1386 (9th Cir. 1985); *In re Donovan*, 871 F.2d 807, 808 (9th Cir. 1989); *In re Fitzsimmons*, 920 F.2d 1468, 1471 (9th Cir. 1990).

A Second Circuit decision, *In re Harris*, 464 F.3d 263 (2d Cir. 2006) (Sotomayor, Circuit Judge), examined the criteria for abuse of discretion in the dismissal of a bankruptcy appeal for non-compliance with non-jurisdictional bankruptcy rules. Under the *Harris* analysis, a court abuses its discretion when it "applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed[s] on the basis of an erroneous view of the applicable law" (citation omitted). *Id.* at 268. The Second Circuit Court of Appeals found that the district court abused its discretion in dismissing debtor's appeal, where the debtor did not include with its appeal a transcript of the proceedings before the bankruptcy court as required by Rule 8006. *Id.* at 274.

In *Resolution Trust Corp. v. SPR Corp. (In re SPR Corp.)*, 45 F.3d 70 (4th Cir. 1995), a panel of the Fourth Circuit, which included Justice Powell (retired), held that under Rule 8001 an appellate court must consider, before dismissing a late-filed appeal, whether to:

> (1) make a finding of bad faith or negligence; (2) give the appellant notice or an opportunity to explain the delay; (3) consider whether the delay had any possible prejudicial effect on the other parties; or (4) indicate that it

> considered the impact of the sanction and available alternatives.

Id. at 72 (cited in *Harris*, *supra*, at 270). In SPR *Corp.*, the Court of Appeals found that the district court abused its discretion in dismissing the appellant creditor's appeal because of an untimely filing of the statement of issues required by Rule 8006. Because the district court did not consider all the above-listed factors, the Court of Appeals vacated the judgment and remanded.

The *Harris* court also looked to a decision of the Ninth Circuit Court of Appeals in reviewing dismissal for abuse of discretion:

> The Ninth Circuit has also held that in the Rule 8006 context, a district court should consider a party's bad faith and the availability of alternative sanctions except in the most egregious of circumstances before dismissing the appeal under Rule 8001. *In re Fitzsimmons*, 920 F.2d 1468, 1474 (9th Cir. 1990).

Harris, 464 F.3d at 270-71.

In *Fitzsimmons*, the Ninth Circuit concluded that the district court did not abuse its discretion in dismissing an appeal by a corporation which violated a number of bankruptcy court rules as well as the requirements of Rule 8006. The bad faith of the appellant "constitutes egregious circumstances which

can warrant dismissal even without the explicit consideration of alternative sanctions and relative fault." *Id.* at 1474. The Ninth Circuit stated that "as a general rule the district court must consider alternative sanctions to dismissal," except in egregious circumstances such as the appellant's bad faith behavior (citing cases). *Id.* at 1472.

In re Hill, 775 F.2d 1385 (9th Cir. 1985) set forth the standard for reviewing abuse of discretion:

> [W]hen any court is considering the imposition of sanctions for non-jurisdictional, procedural defaults and deficiencies in the management of litigation, the selection of the sanction to be imposed must take into consideration the impact of the sanction and the alternatives available to achieve assessment of the penalties in conformity with fault. *Absent such consideration, there is an abuse of discretion.*

Id. at 1387 (emphasis added).

The Ninth Circuit held in *Hill* that it is an abuse of discretion to dismiss a bankruptcy appeal on procedural grounds without considering the impact of the sanction and available alternatives. The Ninth Circuit held in *Fitzsimmons* that "unless there are egregious circumstances, the district court must, as the general rule requires, explicitly consider relative fault and alternative sanctions." *Fitzsimmons*, 920 F.2d at 1474. Yet debtor Stine's appeal was dismissed without any

such consideration of the sanction's impact or available alternatives. The summary dismissal was an abuse of discretion, and the judgment of the circuit court should be vacated.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Federal Rules of Bankruptcy Procedure

Rule 8006. Record and Issues on Appeal

Within 14 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 14 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 14 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing

the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8009. Briefs and Appendix; Filing and Service

(a) Briefs.

Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 14 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file a brief within 14 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 14 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

(b) Appendix to brief.

If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following:

(1) The complaint and answer or other equivalent pleadings;

(2) Any pretrial order;

(3) The judgment, order, or decree from which the appeal is taken;

(4) Any other orders relevant to the appeal;

(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;

(6) Any motion and response on which the court rendered decision;

(7) The notice of appeal;

(8) The relevant entries in the bankruptcy docket; and

(9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel.

An appellee may also serve and file an appendix which contains material required to be included by the appellant but omitted by appellant.

Rule 8010. Form of Briefs; Length

(a) Form of briefs.

Unless the district court or the bankruptcy appellate panel by local rule otherwise provides, the form of brief shall be as follows:

(1) Brief of the appellant.

The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(A) A table of contents, with page references, and a table of cases alphabetically arranged, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(B) A statement of the basis of appellate jurisdiction.

(C) A statement of the issues presented and the applicable standard of appellate review.

(D) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and the disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.

(E) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the

authorities, statutes and parts of the record relied on.

(F) A short conclusion stating the precise relief sought.

(2) Brief of the appellee.

The brief of the appellee shall conform to the requirements of paragraph (1)(A)-(E) of this subdivision, except that a statement of the basis of appellate jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(b) Reproduction of statutes, rules, regulations, or similar material.

If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar material, relevant parts thereof shall be reproduced in the brief or in an addendum or they may be supplied to the court in pamphlet form.

(c) Length of briefs.

Unless the district court or the bankruptcy appellate panel by local rule or order otherwise provides, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or similar material.